Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

DOLLAR GENERAL CORPORATION,
Petitioner,

v.

MARTHA L. BRYANT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the "retaliation prong" of the federal Family and Medial Leave Act ("FMLA"), 29 U.S.C. § 2615(a)(2), which explicitly makes it "unlawful for any employer to discharge ... any individual for opposing any practice made unlawful by this subchapter," provide an independent cause of action to an employee who has not done anything to oppose a practice made unlawful by the FMLA, but who instead claims she was discharged in retaliation for taking leave?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Dollar General Corporation is not a publicly traded corporation. No publicly traded corporation owns more than ten percent of its privately held stock. Dollar General's parent corporation is Kohlberg Kravis Roberts & Co, an entity which is not publicly traded.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 538 F.3d 396 (6th Cir. 2008). That opinion has been provided herein on page 1a of the Appendix. The trial rulings of the United States District Court for the Middle District of Tennessee on Dollar General's Motion for Judgment as a Matter of Law and on jury instructions were made on the record during trial proceedings. Relevant excerpts from the trial proceedings are included in the Appendix at 52a to 73a.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

"It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual *for opposing any practice made unlawful by this subchapter*." 29 U.S.C. § 2615(a)(2) (emphasis added).

INTRODUCTION

There is one "cardinal canon" of statutory construction: "that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations omitted). This Court has emphasized this doctrine, holding that if a statute is unambiguous,

it should be applied as written. The court of appeals departed from this oft-cited canon by judicially creating a cause of action where none exists in the plain language of 29 U.S.C. § 2615(a)(2). Section 2615(a)(2) speaks of one protected activity only – "opposing any practices made unlawful by" the FMLA. Going beyond the Act's plain language, the court of appeals held that § 2615(a)(2) creates a cause of action for employees who have done nothing to oppose unlawful practices, but who instead claim they were discharged for taking leave. *Bryant v. Dollar General Corp.*, 538 F.3d 394, 398-401 (6th Cir. 2008). In so holding, the court below criticized the notion that a statute should be read to mean what it says, deriding such an interpretation as being "strictly textual."

Numerous flaws plague the opinion below. First, the court of appeals violated *Germain* and its progeny by looking beyond § 2615(a)(2)'s plain language. This Court has held that the interpretation of an unambiguous statute should begin and end with its text, and that the "legislative history" should not be consulted when a statute's language is clear. Second, after ignoring *Germain,* the court of appeals ignored the very legislative record it purported to cite. That record specifically states that § 2615(a)(2) "is intended to provide ... protection to workers *who oppose, protest, or attempt to correct alleged violations of the FMLA.*" H.R.Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *46 (emphasis added). Third, the court of appeals refused to address the significant difference between the FMLA's discrimination section and the discrimination section of another federal leave law, the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301, et

seq. The USERRA, which was crafted by the same 103rd Congress that drafted the FMLA, expressly creates a cause of action for employees who are discharged in retaliation for taking USERRA leave. The FMLA has no such prohibition.

Each of these flaws highlights how the courts continue to struggle with fundamental questions of statutory interpretation. There must be a point where a statute is so unequivocally clear that the courts cannot go outside its plain text and infer causes of action not created by Congress. This petition gives the Court an opportunity to determine whether a particular cause of action – retaliation for taking FMLA leave – exists under 29 U.S.C. § 2615(a)(2). This petition also gives the Court a chance to affirm that circumstances still exist where *Germain's* "cardinal canon" is applicable, and where the plain language of an unambiguous statute must be given effect.

STATEMENT OF THE CASE

A. Bryant's Employment with Dollar General and Use of FMLA Leave.

In 2001, Respondent Martha Bryant began working for Dollar General as a senior programmer analyst in its financial marketing department. In 2002, Bryant was diagnosed with Type II diabetes, high blood pressure, and a heart condition. At that time, Bryant informed her supervisors, Tonya Tucker and Pamela Campbell, of her conditions. In early 2004, Dollar General assigned Bryant to the Distribution Center Transaction Project (the "DCT Project"). The DCT

Project entailed converting the system that tracks the inventory of goods in the company's distribution centers from a computer language called "COBOL" to a computer program called "UNIX," which uses a computer language called Oracle.

In mid-April 2004, Campbell suggested to Bryant that she might want to visit with the Human Resources Department in order to talk about the possibility of applying for FMLA leave. Campbell had this conversation with Bryant after Campbell had attended a training session with the Human Resources Department, during which the FMLA was discussed. After this session, Campbell determined that Bryant and another employee – Rhonda Austin – might be eligible for intermittent FMLA leave.

After this conversation, Bryant met with Diane Short, an employee in Human Resources. Short explained to Bryant what the FMLA was and gave Bryant FMLA paperwork to have her doctor complete. Short told Bryant that she could use intermittent leave for doctor appointments and testing related to her diabetes, blood pressure and heart issues. Bryant testified that it was Dollar General's suggestion that she consider completing FMLA paperwork. Bryant turned in her completed FMLA paperwork on May 7, 2004, seeking intermittent FMLA as needed. Thereafter, Bryant took FMLA leave from May 12 to 14 and from May 19 to May 23, 2004, a total of six business days.

B. Bryant's Discipline and Subsequent Termination.

On Friday, April 30, 2004, the day before she was to begin a week's vacation, Bryant was involved in a heated exchange between herself and one of her co-workers, Debbie Mays. The following Monday, while Bryant was on vacation, Bryant's coworkers went to Tucker to discuss the events on the previous Friday. These employees reported that Bryant had started the April 30 argument. Upon Bryant's return to work from vacation, she was placed on a written progressive counseling for her role in this argument.

Afterwards, Bryant confronted two of her coworkers about her placement on progressive counseling. This incident was reported to Campbell and Tucker, and they proceeded to instruct Bryant to cease confronting her coworkers about her placement on progressive discipline. Not long after this meeting, Bryant told another co-worker – Stephen Dishman – about the meeting she had just had, where she had been instructed not to speak with coworkers about her progressive counseling. Dishman relayed this conversation on to Campbell and Tucker, both of whom believed Bryant's conversation with Dishman violated the instructions they had just given Bryant to not talk about her progressive counseling with coworkers. Thereafter, on May 27, 2004, Bryant's employment was terminated.

C. The Proceedings Before the District Court.

In October 2005, Bryant filed a lawsuit against Dollar General, claiming it had terminated Bryant

"because she exercised FMLA rights." Because Bryant's Complaint asserted a claim under a federal statute, the district court had federal question jurisdiction under 28 U.S.C. § 1331.

Bryant's Complaint did not assert whether she was proceeding under the "interference" prong of the FMLA, 29 U.S.C. § 2615(a)(1), or the "retaliation" prong of § 2615(a)(2). However, Bryant responded to a request for admission by admitting that, "Plaintiff is not claiming interference with her rights under the FMLA as a cause of action." Thus, the parties litigated only an alleged violation of § 2615(a)(2), with Bryant taking the position that she was discharged in retaliation for taking six days of FMLA leave. Bryant asserted a claim under § 2615(a)(2), even though she did not contend that she had done anything to "oppose any practice made unlawful" by the FMLA. For example, she did not claim or put on proof that she had voiced opposition to how Dollar General administered its FMLA policies.

The district court analyzed Bryant's FMLA claim under § 2615(a)(2). When denying Dollar General's summary judgment motion as to Bryant's FMLA claim, the district court held:

> The Sixth Circuit "recognizes two distinct theories for recovery under the FMLA: (1) the 'entitlement' or 'interference' theory arising from 29 U.S.C. § 2615(a)(1); and (2) the 'retaliation' or 'discrimination' theory arising from 29 U.S.C. § 2615(a)(2)." *This case presents a retaliation / discrimination theory* of recovery

> under the FMLA and those terms are used together interchangeably herein.

Bryant v. Dollar General Corp., No. 3:05-0840, 2006 WL 2559526, *7, n.8 (M.D. Tenn. Aug. 31, 2006) (emphasis added) (quoting *Killian v. Yorozu Automotive Tennessee, Inc.*, 454 F.3d 549, 555-56 (6th Cir. 2004)) (Petitioner's Appendix 43a).

A trial occurred from October 31, 2006, to November 2, 2006. At the close of all proof, Dollar General moved for judgment as a matter of law. Dollar General asserted that Bryant's FMLA claim failed because § 2615(a)(2) prohibits only retaliation against an individual who has "oppos[ed] any practice made unlawful by" the FMLA. As Dollar General argued, since Bryant had failed to put on any proof that she had in fact opposed a practice unlawful under the Act, her claim failed to state a claim under § 2615(a)(2). The district court denied Dollar General's motion. (Petitioner's Appendix 56a-57a, 63a-64a).

Dollar General asserted its statutory interpretation argument again in objections to the district court's proposed jury instructions. Dollar General's counsel asserted that, "as I explained during the Rule 50 motion, the statute itself [*i.e.*, § 2615(a)(2)] does not provide for a retaliation claim such as the one being brought. The statute only provides for a retaliation claim when an individual has opposed practices." The district court again rejected Dollar General's interpretation of the FMLA.

On November 2, 2006, the jury entered a verdict in favor of Bryant.

D. The Court of Appeals Rejects a "Strictly Textual" Interpretation of § 2615(a)(2).

On appeal, Dollar General again asserted its argument based on the plain language of § 2615(a)(2). As Dollar General contended, Bryant's claim that she was terminated in retaliation for taking leave did not state a claim under § 2615(a)(2) because § 2615(a)(2)'s plain language only speaks of retaliation "for opposing any practice made unlawful by this subchapter."

The Sixth Circuit Court of Appeals rejected Dollar General's argument and affirmed the judgment below. (*See* Petitioner's Appendix 1a-20a). In so holding, the court of appeals did not and could not contradict Dollar General's underlying point – *i.e.*, the text of § 2615(a)(2) does not speak of claims such as the one Bryant raised. Instead, the court of appeals chastised this reading as being "strictly textual." *Bryant*, 538 F.3d at 398. Rather than basing its opinion on what § 2615(a)(2) actually says, the court of appeals looked to other sources to support its view on what § 2615(a)(2) should mean, a decidedly less than "strictly textual" view.

First, the court of appeals purportedly looked to "legislative intent" and held that "[i]nterpreting § 2615(a)(2)'s ban on discrimination in a manner that would permit employers to fire employees for exercising FMLA leave would *undoubtedly* run contrary to Congress's purpose in passing the FMLA." *Bryant*, 538 F.3d at 401 (emphasis added). While basing its holding on the FMLA's undoubted legislative history, the court of appeals cited no legislative history whatsoever where a Senator or House Representative

said anything about retaliation for taking FMLA leave or an intent to make retaliation for taking FMLA leave illegal. *See id.* Instead, the court of appeals cited the testimony of individuals, testimony which Congress cited as evincing a need to create a federal entitlement to leave. *Id.* (citing H.R.Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *26). Even though the court of appeals purported to base its holding on legislative history (as opposed to the statute's plain language), it apparently could not find any portion of the legislative record where a Senator or House Representative spoke of creating a prohibition on retaliation for taking leave in the Act. Most perplexing, the court did not cite the portion of the legislative history that actually discusses § 2615(a)(2), history which can be found at No. 103-8(I), 103d Cong., 1st Sess. 1993, at *46.

More troubling, when basing its holding on its view of the FMLA's legislative history, the court of appeals gave no explanation at all as to what part of § 2615(a)(2) was so ambiguous as to warrant looking to the Act's legislative history in the first place. This Court has instructed that legislative history has no role in statutory interpretation when the statute's plain language is unambiguous. As this Court has held, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Germain*, 503 U.S. at 254. The court of appeals gave no hint as to why its inquiry into § 2615(a)(2) could not be completed simply by looking at what it says.

Second, the court of appeals relied upon its perception of "the nature of the statutory scheme" to support its holding. *Bryant*, 538 F.3d at 400. As the

court of appeals observed, the FMLA entitles a qualifying employee to twelve weeks of unpaid leave per year. *Bryant,* 538 F.3d at 401 (citing 29 U.S.C. § 2612(a)(1)). When rejecting Dollar General's "strictly textual" argument concerning § 2615(a)(2), the court of appeals opined that, "Any 'right' to take unpaid leave would be utterly meaningless if the statute's bar against discrimination failed to prohibit employers from considering an employee's FMLA leave as a negative factor in employment decisions." *Bryant,* 538 F.3d at 401. As seen here, rather than focusing on what § 2615(a)(2) actually says, the court based its opinion on §2615(a)(2) should say.

Third, the court of appeals found that there was an "overwhelming consensus of the case law in the circuits" to support Bryant's reading of § 2615(a)(2). *Bryant,* 538 F.3d at 400 (citing *Darby v. Bratch,* 287 F.3d 673, 679 (8th Cir. 2002); *Strickland v. Water Works & Sewer Bd. of City of Birmingham,* 239 F.3d 1199, 1206-07 (11th Cir. 2001); *King v. Preferred Tech. Group,* 166 F.3d 887, 891 (7th Cir. 1999); *Hodgens v. Gen. Dynamics Corp.,* 144 F.3d 151, 160 n. 4 (1st Cir. 1998)). However, not a single case cited by the court of appeals in support of its perception of an "overwhelming consensus" involved the issue presented here – *i.e.,* a challenge by an employer that a claim such as Bryant's failed because it was not encompassed by the plain language of § 2615(a)(2). *See Darby,* 287 F.3d at 679; *Strickland,* 239 F.3d at 1206-07; *King,* 166 F.3d at 891; *Hodgens,* 144 F.3d at 160.

REASONS FOR GRANTING THE PETITION

This petition gives the Court an opportunity to determine whether a particular cause of action – retaliation for taking FMLA leave – actually exists under 29 U.S.C. § 2615(a)(2). This petition also presents an excellent chance to provide clarity that *Germain's* "cardinal canon" still lives, and that the interpretation of an unambiguous statute must begin and end with its plain text.

This case is not the first time that a court of appeals has encountered difficulty with statutory construction in the retaliation context. In its last term, the Court was called upon to determine whether the federal-sector provision of the Age Discrimination in Employment Act ("ADEA"), which prohibits discrimination against individuals over the age of forty, also prohibited retaliation against a federal employee who complains about age discrimination. *Gomez-Perez v. Potter,* 128 S.Ct. 1931 (2008). During this same term, the Court was also asked to determine whether 42 U.S.C. § 1981(a) encompasses a claim of retaliation against a person who has complained about a violation of another person's contract-related right. *CBOCS West, Inc. v. Humphries,* 128 S.Ct. 1951 (2008). While the ADEA's federal-sector provision does not specifically state a cause of action for retaliation, the Court held that its prohibition of "discrimination based on age" includes a prohibition against retaliation based on the filing of an age discrimination complaint. *Gomez-Perez,* 128 S.Ct. at 1936-43. Similarly, the Court held that § 1981(a)'s prohibition of discrimination based upon race includes a prohibition of retaliation based on the filing of a race

discrimination complaint. *CBOCS,* 128 S.Ct. at 1954-60.

The instant case presents a natural follow-up question to *Gomez-Perez* and *CBOCS.* In light of *Gomez-Perez* and *CBOCS,* is the "cardinal canon" this Court articulated in *Germain* now a dead letter, or do circumstances remain where a statute is so unequivocally clear that the courts simply cannot go outside its plain text and create a cause of action that was not created by Congress?

Questions of how, if at all, a court should utilize "legislative intent" are inherent to this inquiry. When drafting § 2615(a)(2), Congress specifically described its intent in the legislative record. Congress stated that § 2615(a)(2) was an "'opposition' clause that is derived from Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-3(a)) and is intended to be construed in the same manner." H.R.Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *46. Congress elaborated that § 2615(a)(2) "is intended to provide ... protection to workers who oppose, protest, or attempt to correct alleged violations of the FMLA" and gave multiple examples of the types of protected activities it intended § 2615(a)(2) to cover. *See id.* Just as a claim of "retaliation for taking leave" is not found in § 2615(a)(2)'s plain language, the legislative record on § 2615(a)(2) is devoid of anything explicitly or inferentially referencing a claim of "retaliation for taking leave."

As seen in the legislative record, Congress spelled out in great detail its intent when passing § 2615(a)(2). Such explicit legislative intent was not present in

either *Gomez-Perez* or *CBOCS*. Both § 2615(a)(2) and its legislative record are unambiguous. Nevertheless, the court of appeals found it permissible to judicially amend a statute and create a claim that is not found in its plain text and that Congress did not say it intended.

The issue raised by this petition also entails an inquiry as to the amount of significance that should be given to differing statutory language when the same Congress drafts two related statutes and creates a particular cause of action in one statute but not in the other. This Court faced a similar question *Gomez-Perez*. The portion of the ADEA that pertains to employees in the private sector explicitly provides for a claim of retaliation, but the federal-section portion of the ADEA does not. *Compare* 29 U.S.C. § 633a(a) *with* §623(d). Seven years, however, separated the drafting of § 633a(a) and § 623(d), and the Court found that this temporal separation diminished the importance of the differing language used in the two provisions. *Gomez-Perez,* 128 S.Ct. at 1940.

This lack of temporal proximity is not present in the instant case. To the contrary, the exact same 103rd Congress crafted both the USERRA and the FMLA. The former specifically provides for a claim of retaliation for taking USERRA leave. The latter does not articulate a claim of retaliation for taking FMLA leave. If the same Congress creates a claim in one statute but not in another, should there not be at least some presumption that Congress acted intentionally and purposefully when it declined to create that claim?

This petition provides the Court with a perfect opportunity to answer these fundamental questions of statutory construction. It gives the Court a chance to provide clarity on whether *Germain's* "cardinal canon" still exists where, as here, all parties agree that a statute is unambiguous.

This petition also gives the Court an opportunity to resolve a split in the circuits. The Courts of Appeals for the Seventh and Ninth Circuits have held that the plain language of § 2615(a)(2) does not encompass a claim of retaliation for taking leave. *See Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997). The opinion from the Sixth Circuit Court of Appeals is in conflict with these two circuits.

I.

THIS PETITION IS AN EXCELLENT VEHICLE TO RESOLVE AN IMPORTANT QUESTION – UNDER WHAT CIRCUMSTANCES, IF ANY, DOES *GERMAIN'S* "CARDINAL CANON" STILL APPLY?

A. The Court of Appeals' Decision to Look Outside the Act's Plain Text Conflicts with This Court's "Cardinal Canon" of Statutory Construction Expressed in *Germain*.

This Court has articulated a strictly textual canon to statutory construction, holding that "a legislature says in a statute what it means and means in a statute what it says there," and when "the words of a statute

are unambiguous, then ... judicial inquiry is complete." *Germain,* 503 U.S. at 253-54. The court of appeals rejected a "strictly textual" view to § 2615(a)(2), a decision that flies in the face of *Germain* and its progeny.

The language of § 2615(a)(2) is clear and unambiguous. In its entirety, it states as follows: "Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2). The one and only protected activity set forth by § 2615(a)(2) is "opposing any practice made unlawful by" the FMLA. *Id.* Nowhere does § 2615(a)(2) say that an employee engages in an activity protected by § 2615(a)(2) when she takes FMLA leave, and nowhere does § 2615(a)(2) proscribe retaliation against employees for taking FMLA leave.

Given the unambiguous nature of § 2615(a)(2), the "judicial inquiry is complete." *Germain,* 503 U.S. at 253-54. Congress clearly said what it meant in § 2615(a)(2), and § 2615(a)(2) means what it says – an employer violates § 2615(a)(2) by discharging an employee *for opposing any practice* made unlawful by the FMLA, period. The court below drastically departed from *Germain* by judicially rewriting a "retaliation for taking leave" cause of action into § 2615(a)(2) when the plain language of this statute includes no such claim.

This Court has held previously that where a statute is free of ambiguity, it is to be applied as written, and that it is not the province of the courts to add to the

plain language of a statute. *See, e.g., Germain,* 503 U.S. at 253-54; *see also United States v. Gonzales,* 520 U.S. 1, 6 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."). "'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.,* 541 U.S. 246, 252, (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985)).

As this Court has held in *Germain, Gonzalez, Engine Mfrs. Assn.,* and elsewhere, where a statute is unambiguous, the courts are not to look to outside sources – such as legislative history – when interpreting the statute. The court of appeals departed from this bedrock principle. There is nothing unclear about the text of § 2615(a)(2). It is not ambiguous as to what type of activity it is protecting: "opposing any practice made unlawful by this subchapter." At no point has the court of appeals, Bryant or *amicus curiae* ever explained what exactly is so unclear about this language so as to necessitate looking outside of this text in order to interpret it.[1] Nonetheless, rather than

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[1] The court of appeals did not simply deviate from this Court's instructions on how to interpret a statute. The court of appeals also departed from its own numerous holdings that a statute "where a statute is free of ambiguity, it is to be applied as written," *Cox v. Mayer,* 332 F.3d 422, 426 (6th Cir. 2003), and that the courts "may not amend or add to the plain language of a statute." *Telespectrum, Inc. v. Public Service Com'n of Kentucky,* 227 F.3d 414, 421 (6th Cir. 2000); *see also Bartlik v. United States*

completing its inquiry at the Act's plain text, the court of appeals ventured beyond this text and into legislative history to justify its desired interpretation of § 2615(a)(2). This method of statutory interpretation is in direct conflict with *Germain's* "cardinal canon."

The text of § 2615(a)(2) is the law, and it is that text that must be observed. Bryant did not assert that she engaged in the activity protected by § 2615(a)(2), *i.e.* opposing a practice made unlawful by the FMLA, and her claim thus fails to state a claim under § 2615(a)(2). This petition gives this Court the opportunity to clarify that *Germain's* "cardinal canon" is still operative where, as here, the plain language of a statute is clear. It gives the chance for this Court to affirm that circumstances still exist where a "strictly textual" reading of a statute is indeed appropriate.

B. The Decision Below Directly Conflicts with the Stated Intent of Congress When Passing § 2615(a)(2).

If the court of appeals was going to disregard this Court's repeated holdings and consider the FMLA's legislative history, at the very least it should have actually read the portion of that history pertaining to § 2615(a)(2). The legislative record that actually discusses Congress's intent in passing § 2615(a)(2) states that it is an "opposition clause" that is intended

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Dep't of Labor, 62 F.3d 163, 166 (6th Cir. 1995) ("When we can discern an unambiguous and plain meaning from the language of the statute, our task is at an end.").

to protect employees against "employer retaliation for *opposing any practice* that he or she reasonably believes to be a violation of this title." H.R.Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *46 (emphasis added). Nowhere did the court of appeals cite this portion of the legislative record. Instead, it relied exclusively on portions of the legislative record having nothing to do with § 2615(a)(2) when judicially amending the act to say what it thought it should say.

The only part of the legislative record cited by the court of appeals to support its view of the "undoubted" intent of Congress was H.R.Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *21, 26. *See Bryant*, 538 F.3d at 401. Citation of this portion of the legislative record is most perplexing, because this is not the part of the legislative history that actually discusses § 2615(a)(2), the statute the lower court was ostensibly interpreting. Instead, the cited portion of the legislative record summarized what Congress called "Testimony about the need for family leave." *See* H.R.Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *24. This section described testimony that Congress had heard, and which it thought demonstrated a need to create a right to twelve weeks of leave to care for one's serious health condition or the serious health condition of one's family member. *See id.* As this section described, "The members of the committee have heard testimony from working men and women who have been *denied leave* in each of the circumstances covered by the bill." *Id.* at *24 (emphasis added). This portion of the legislative history plainly deals with the substantive right being created by the FMLA, *i.e.* leave, and not the retaliation provision of § 2615(a)(2). At no point in this section is there a discussion of retaliation for taking the new

leave that was about to be created by the Act. *See id.* at *24-26. At no point do the words "retaliation" or "discrimination" even appear in this portion of the history cited by the court of appeals. *See id.*

Page 46 of this legislative record is the applicable part that actually discusses Congress's intent in passing § 2615(a)(2). Here, Congress elaborated on the activity it intended to protect in (a)(2) – voicing opposition to an employer's unlawful acts. H.R.Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *46. Specifically, that record reads as follows:

> Prohibited acts
>
> Section 105(a)(1) makes it unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under the act. Section 105(a)(2) makes if unlawful for an employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title. ***This "opposition" clause is derived from Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-3(a)) and is intended to be construed in the same manner. Under Title VII and under section 105(a), an employee is protected against employer retaliation for opposing any practice that he or she reasonably believes to be a violation of this title.***
>
> Title VII's opposition clause "forbids discrimination against applicants or employees for attempting to protest or correct allegedly

> discriminatory conditions of employment." *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 796 (1973). The Equal Employment Opportunity Commission has identified a number of examples of "opposition" protected by section 704(a) of the Civil Rights Act of 1964: complaining to anyone (including management, unions, other employees, or newspapers) about allegedly unlawful practices; participating in a group that opposes discrimination; refusing to obey an order because the worker thinks it is unlawful under the act; opposing unlawful acts by persons other than the employer – e.g., former employers, unions, and coworkers. EEOC Compliance Manual sec. 492. ***Section 105(a)(2) of the FMLA is intended to provide the same types of protection to workers who oppose, protest, or attempt to correct alleged violations of the FMLA.***

Id. (emphasis added).

The court of appeals held that the "FMLA's legislative history weigh[ed] strongly in favor of" interpreting § 2615(a)(2) to include a claim of retaliation for taking leave. *Bryant,* 538 F.3d at 400. How can that possibly be, in light of the legislative record cited above? Congress unequivocally and in detail explained what types of activities (a)(2) was intended to protect:

- "opposing any practice that he or she reasonably believes to be a violation of this title."

- "complaining to anyone (including management, unions, other employees, or newspapers) about allegedly unlawful practices."

- "participating in a group that opposes discrimination."

- "refusing to obey an order because the worker thinks it is unlawful under the act."

- "opposing unlawful acts by persons other than the employer – e.g., former employers, unions, and coworkers."

- "Oppos[ing], protest[ing], or attempt[ing] to correct alleged violations of the FMLA."

H.R.Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *46. These are the sum total of the protected activities listed. Absolutely nowhere does the legislative history state or even suggest that § 2615(a)(2) is intended to create a cause of action of "retaliation for taking leave." *See id.*

The legislative record's express citation of Title VII's opposition clause further highlights the fundamental flaw in the court of appeals' reasoning. When explaining § 2615(a)(2), Congress specifically cited Title VII's opposition clause, 42 U.S.C. § 2000e-3(a), and instructed that § 2615(a)(2) was to "be construed in the same manner" as Title VII's opposition clause. *Id.* Title VII's opposition clause prohibits discrimination against an employee "because he has opposed any practice made an unlawful

employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

The activity protected by 42 U.S.C. § 2000e-3(a) is opposing practices made unlawful by Title VII. Likewise, the activity protected by § 2615(a)(2) is opposing practices made unlawful by the FMLA. If Congress's stated intent is to be followed and 29 U.S.C. § 2615(a)(2) is to "be construed in the same manner" as § 2000e-3(a), the only permissible interpretation of § 2615(a)(2) is that it protects one thing and one thing only – engaging in opposition to unlawful practices.

When construing § 2000e-3(a), this Court has underscored the differences between Title VII's substantive provisions and its opposition clause found at § 2000e-3(a), which focuses on preventing harm to individuals who engage in the activity of opposing an unlawful practice. *See Burlington Northern and Santa Fe Ry. Co. v. White,* 548 U.S. 53, 63 (2006) ("The substantive provision [of Title VII] seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.").[2] Likewise, there is a difference between the substantive rights provided by the FMLA, *i.e.*, leave,

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[2] *See also CBOCS,* 128 S.Ct. at 1963 (Thomas, C., dissenting) (emphasis in original) ("Retaliation is not discrimination based on race. When an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his *race;* rather, it is the result of his *conduct*.").

and the activity that § 2615(a)(2) protects, *i.e.* voicing opposition to an unlawful practice.

Looking to legislative history to interpret an unambiguous statute violated *Germain's* "cardinal canon." But if the court of appeals was going to disregard this Court's instructions on how to interpret statutes and consider the FMLA's legislative history, at a bare minimum it should have cited the part of the record that actually discusses Congress's intent in passing § 2615(a)(2). Rather than citing the part of the legislative record that actually speaks of Congress's intent in passing § 2615(a)(2), the court below looked to parts of the record having nothing to do with § 2615(a)(2), so as to support its desired rewriting of this provision.

This petition gives the Court the opportunity to clarify that this method of interpretation – *i.e.*, picking and choosing irrelevant portions of the legislative record over the portion that actually cites the provision at issue – is not an acceptable method of statutory construction. Where a statute is unclear and consultation of the legislative history is required, such consultation should actually focus on the portion of the history that pertains to the provision of the statute at issue.

C. If the 103rd Congress Had Intended to Create a Cause of Action in § 2615(a)(2) for Employees Who are Retaliated Against for Taking Statutorily Provided Leave, It Clearly Knew How to Create that Cause of Action, as Evinced by the USERRA.

While the court of appeals looked outside the Act's language when divining Congress's intent in enacting § 2615(a)(2), it ignored a key distinction between the FMLA and another federal leave law enacted by that very same Congress, the USERRA, 38 U.S.C. § 4301, et seq.

Just like the FMLA, the USERRA provides federally mandated leave to certain qualifying employees. Unlike the FMLA, however, the USERRA expressly provides a cause of action to employees who are discharged in retaliation for taking USERRA leave. If Congress's purpose in § 2615(a)(2) was "undoubtedly" to provide a retaliation cause of action to employees discharged for taking leave, as the court of appeals found, one would think that Congress would have simply said so. That same Congress had demonstrated the wherewithal to create such a cause of action in the USERRA. The inclusion of a "retaliation for taking leave" cause of action in the USERRA and its complete absence in the FMLA's text sheds more light on Congress's intent than any portion of the legislative record cited by the court of appeals.

A comparison of the FMLA to the other leave law passed by the exact same 103rd Congress demonstrates that Congress did know how to create a "retaliation for taking leave" cause of action, if it so intended. The

USERRA sets forth an employer's obligations when employees must take leave due to their service in the military. 38 U.S.C. § 4312. Echoing the FMLA, the USERRA creates a reinstatement entitlement to employees who take leave due to military service. *Id.* Also like the FMLA, the USERRA has a section on discrimination:

> An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) *has exercised a right provided for in this chapter.*

Id. § 4311(b) (emphasis added).

Congress crafted the USERAA in a manner where its plain language unambiguously prohibits discharging an employee because she exercises a right provided for by the USERRA, *i.e.* taking leave for military service. Further demonstrating that Congress knows how to create a claim of retaliation for taking statutorily provided leave, if it so desires, it reiterated that cause of action later in the statute. The USERRA's discrimination section goes on to explain, "An employer shall be considered to have engaged in actions prohibited under subsection (b), if the person's ... exercise of a right provided for in this chapter is a

motivating factor in the employer's action ..." *Id.* § 4311(c)(2)(D).

A comparison of the FMLA to the USERRA is telling. Both provide protected leave to qualifying employees. Both create a reinstatement entitlement. Both articulate certain types of prohibited discrimination. However, both have a key distinction. The USERRA expressly prohibits discharging an employee because she has "exercised a right provided for" by the USERAA, and it even goes on to elaborate on the particular intent it is prohibiting an employer from acting upon. *Id.* § 4311(b), (c). Section 2615(a)(2) of the FMLA contains no such prohibition. *See* 29 U.S.C. § 2615(a)(2). The USERRA confirms beyond any doubt that the 103rd Congress had the know how to make the taking of FMLA leave an activity protected by § 2615(a)(2). For whatever reason, it did not do so.

The court below ignored this undeniable and meaningful distinction between the FMLA and the USERRA. The court of appeals held that "[e]stablished principles of statutory interpretation caution against interpretations that lead to internal inconsistencies ..." *Bryant,* 538 F.3d at 402. Nonetheless, the court of appeals did nothing to explain the inconsistency between the FMLA and the USERRA. It did not even attempt to explain how the express inclusion of a retaliation cause of action by the 103rd Congress in the USERRA but not in the FMLA did not shed at least some light into congressional intent. Nor did it attempt to explain why that obvious discrepancy between those two statutes should just be ignored.

This Court has instructed on numerous occasions that when Congress uses different words, there is a presumption that Congress acted intentionally and purposely when using different language. *See, e.g., Burlington,* 548 U.S. at 63 (quoting *Russello v. United States,* 464 U.S. 16, 23 (1983)) ("Rather, the question is whether Congress intended its different words to make a legal difference. We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"). There must be some presumption that the 103rd Congress intended a difference between the FMLA and the USERRA by its utilization of disparate language.

Indeed, Chief Justice Roberts made a similar point in his dissenting opinion in *Gomez-Perez,* 128 S.Ct. 1931 at 1947-48. Chief Justice Roberts dissented, based in part on the fact that the same Congress that had amended the federal Fair Labor Standards Act ("FLSA") to include a claim of retaliation did not include such a claim when drafting the ADEA. *Id.* at 1947-48 (Roberts, J., dissenting). As Chief Justice Robert stated:

> Other actions Congress took at the same time that it enacted § 633a in 1974 further underscore the point that Congress deliberately chose to exclude retaliation claims from the ADEA's federal-sector provision. The Fair Labor Standards Amendments of 1974, as the Act's name suggests, dealt for the most part not with the ADEA, but with the Fair Labor Standards Act of 1938, extending that statute's protections to federal employees. See FLSA Amendments,

§ 6(a)(2), 88 Stat. 58. In doing so, Congress explicitly subjected federal employers to the FLSA's express antiretaliation provision, 29 U.S.C. § 215(a)(3). Congress did *not* similarly subject the Federal Government to the express antiretaliation provision in the ADEA, strongly suggesting that this was a conscious choice.

...

Congress specifically chose in the FLSA Amendments to treat States and the Federal Government differently with respect to the ADEA itself. It subjected the former to the ADEA's private-sector provision, see FLSA Amendments, § 28(a)(2), 88 Stat. 74-including the express prohibition against retaliation in § 623(d) – while creating § 633a as a stand-alone prohibition against discrimination in federal employment, without an antiretaliation provision, see § 28(b)(2), *ibid.* This decision evinces a deliberate legislative choice *not* to extend those portions of the ADEA's private-sector provisions that are not expressly included in § 633a, as of course Congress specified in § 633a(f).

Given all this, it seems safe to say that the text and structure of the statute strongly support the proposition that Congress did not intend to include a cause of action for retaliation against federal employees in § 633a(a).

Id. (emphasis in original).

Paraphrasing the point made by Chief Justice Roberts, the same Congress that drafted the USERRA also drafted the FMLA. It thus seems safe to say that the text and structure of § 2615(a)(2) strongly support the proposition that Congress did not intend to include a "retaliation for taking leave" cause of action in § 2615(a)(2), given that Congress created such a claim in the USERRA but not in the FMLA. At the very least, this is a question the court of appeals should have addressed, rather than simply ignored.

The lower court's unexplained refusal to even consider the inclusion of this type of claim in the USERRA but not in the FMLA strikes at a fundamental error lying at the core of its opinion, and it highlights the need to accept certiorari in this case. Rather than applying § 2615(a)(2) to mean what it says, the court of appeals rewrote § 2615(a)(2) to mean what it thought it should say, looking to whatever sources it deemed helpful to achieve its desired interpretation, and ignoring any and all sources that flew it the face of that interpretation. This is a perfect example of why *Germain's* "cardinal canon" is sound. Reliance upon things outside a statute's plain text, such as legislative history, inevitably leads to varying results amongst different circuits, as each looks to whatever outside source it can find that plausibly supports its desired end.

The court of appeals took it upon itself to create a cause of action that Congress had not created. Many would undoubtedly argue that protecting individuals who take FMLA leave from retaliation is a worthy goal and good public policy. But if the Constitution is to be honored, this is an issue for Congress to decide. If

Congress wishes to include in § 2615(a)(2) a prohibition from retaliating against an employee because they take FMLA leave, it can very easily do so. It did so when drafting the USERRA. However, this is a job for Congress, not the courts, a fundamental canon of which the court below lost sight. This petition gives this Court the opportunity to guide the courts that their role is to interpret the statutes as they are written, not how they think they should have been written.

II.

THE CIRCUITS ARE SPLIT

The court of appeals perceived that there was an "overwhelming consensus of the case law in the circuits" to support its desired reading of § 2615(a)(2). *Bryant*, 538 F.3d at 400. This simply is not the case. Two different circuits have held that § 2615(a)(2) does not encompass a claim of retaliation for taking leave.

The Ninth Circuit Court of Appeals has held that a claim such as Bryant's, where an employee claims she was fired in retaliation for taking leave, is outside the scope of § 2615(a)(2). *See Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001). In *Bachelder*, the plaintiff alleged that her employer had impermissibly considered her past use of FMLA leave when making the decision to terminate her employment. *Id.* at 1121. The Ninth Circuit held that Bachelder's claim was not encompassed by § 2615(a)(2), holding as follows:

> Bachelder's claim does not fall under the "anti-retaliation" or "anti-discrimination" provision of § 2615(a)(2), which prohibits "discriminat[ion] against any individual for opposing any practice made unlawful by the subchapter"; nor does it fall under the anti-retaliation or anti-discrimination provision of § 2615(b), which prohibits discrimination against any individual for instituting or participating in FMLA proceedings or inquiries. *By their plain meaning, the anti-retaliation or anti-discrimination provisions do not cover visiting negative consequences on an employee simply because he has used FMLA leave.*

Id. at 1124 (emphasis added). While the court of appeals went on to hold Bachelder's claim fell under the interference prong of § 2615(a)(1), as seen in the passage cited above, it found a claim of retaliation for taking leave to not be encompassed by (a)(2)'s plain language. *See id.* This mirrors the position taken previously by the Seventh Circuit Court of Appeals. *See Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 713 (7th Cir. 1997) (holding that claim of plaintiff who was fired after taking FMLA leave did not fall under 29 U.S.C. § 2615(a)(2); although that subsection stated that it is unlawful for an employer to discriminate against any individual for "opposing any practice made unlawful by this subchapter," the plaintiff "does not say that he is a victim of discrimination in this sense").[3]

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[3] The fact that *Bachelder* and *Diaz* held such a theory to state a claim under § 2615(a)(1) is of no consequence to the issue raised

Having ignored the plain language of § 2615(a)(2), the explicit legislative record about § 2615(a)(2) and the obvious difference between the discrimination provisions of the FMLA and the USERRA, the court of appeals continued its pattern of willful blindness by remaining silent on this circuit split. There is no "overwhelming consensus" that a claim of "retaliation for taking leave" states a claim that is cognizable under § 2615(a)(2). To the contrary, the circuits are split on this issue. The Ninth Circuit has held that, by its "plain meaning," § 2615(a)(2) does not encompass a claim like Bryant's, a proposition with which at least one other circuit agrees. *Bachelder,* 259 F.3d at 1124. If the court below was going to judicially amend § 2615(a)(2) to create a retaliation for taking leave claim, at the very least it should have explained why it disagreed with those circuits that hold such a claim not to be encompassed by the plain meaning of § 2615(a)(2).[4]

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in this petition. Bryant has never pled an interference theory, and she admitted she was not bringing an interference claim. Both the district court and the court of appeals analyzed Bryant's claim under § 2615(a)(2). Both courts below held that her theory states a claim under § 2615(a)(2), and it is that ruling which is appealed here. The sole issue presented in this petition is whether or not a claim such as Bryant's states a claim under § 2615(a)(2).

[4] Also troubling in the court of appeals' perception of an "overwhelming consensus" is the fact that not a single case cited by the court for this proposition actually involved a challenge by an employer that a claim such as Bryant's failed because it was not encompassed by the plain language of § 2615(a)(2). *See Darby,* 287 F.3d at 679; *Strickland,* 239 F.3d at 1206-07; *King,* 166 F.3d at 891; *Hodgens,* 144 F.3d at 160.

The court of appeals' unexplained silence on this circuit split only serves to highlight the flaws that plague the opinion below. More fundamental to the question of whether or not certiorari should be granted, this split underscores the need of this Court to accept certiorari. Supreme Court Rule 10(a) recognizes a split in the circuits as a reason for certiorari to be accepted. Certiorari should be granted here so as to resolve the split between the circuits as to whether or not a claim such as Bryant's states a claim under § 2615(a)(2).

III.

29 C.F.R. § 825.220(C) IS AN INVALID INTERPRETATION OF § 2615(A)(2) AND DOES NOT JUSTIFY THE JUDICIAL REWRITING OF THE ACT

The court of appeals also justified the ruling below on its finding that a regulation implemented by the Department of Labor ("DOL"), 29 C.F.R. § 825.220, was a valid interpretation of 29 U.S.C. § 2615(a)(2). *Bryant*, 538 F.3d at 402. This regulation – without stating whether it is implementing the interference prong of § 2615(a)(1) or the retaliation prong of § 2615(a)(2) – states that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." 29 C.F.R. § 825.220(c). Dollar General contended below that to the extent this regulation was read to implement § 2615(a)(2), as opposed to § 2615(a)(1), this regulation was invalid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The court of appeals rejected this

argument, holding that this regulation is a valid interpretation of § 2615(a)(2). *Bryant*, 538 F.3d at 401-02. The court of appeals based this holding on the same things it identified as justifying its interpretation of the statute itself – "its legislative history," the "consensus" it perceived in its sister circuits, and "the structure and purpose of the Act." *Id.*

The same problems that plague the lower court's rationale for rewriting § 2615(a)(2) also infect its purported justification for finding 29 C.F.R. § 825.220 to be a valid interpretation of § 2615(a)(2). As set forth above, the legislative history leads to the exact opposite conclusion. There is no circuit "consensus" on whether a claim of "retaliation for taking leave" is cognizable under §2615(a)(2); instead the circuits are split. And the "structure and purpose of the Act" do not justify the judicial creation of a cause of action not created by Congress.

To the extent 29 C.F.R. § 825.220(c) is read to implement the retaliation prong, § 2615(a)(2), that regulation is manifestly contrary to the plain language of (a)(2) and therefore invalid. In *Chevron*, this Court articulated the now-familiar standard for courts to apply when reviewing an agency's construction of a statute: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Thus, *Chevron* in many ways mirrors to the "cardinal canon" of statutory interpretation the Court articulated in *Germain*, 503 U.S. at 253-54. If the intent of Congress is clear in the statute, "that is the end of the matter" when determining whether an agency's interpretation

of a statute is a valid exercise of that agency's authority. *Chevron,* 467 U.S. at 842-43. It is well settled that deference to an agency's interpretation of a statute "has important limits: A regulation cannot stand if it is 'arbitrary, capricious, *or manifestly contrary to the statute.*'" *Ragsdale v. Wolverine World Wide, Inc.,* 535 U.S. 81, 86 (2002) (emphasis added) (quoting *United States v. O'Hagan,* 521 U.S. 642, 673 (1997); *Chevron,* 467 U.S. at 844).

To the extent 29 C.F.R. § 825.220(c) is read interpret § 2615(a)(2) so as to create a claim of "retaliation for taking FMLA leave" under § 2615(a)(2), the regulation is "manifestly contrary to" the plain language § 2615(a)(2). As set forth above, § 2615(a)(2) is clear and unambiguous. Congress has directly spoken about the type of retaliation prohibited by § 2615(a)(2), and its intent is clear – it is an "opposition clause" which prohibits retaliation against employees who "oppos[e] any practice made unlawful by" the FMLA. Congress did not speak in § 2615(a)(2) about employees who are retaliated against for taking FMLA leave, a fact made all the more clear by § 2615(a)(2)'s legislative history. As such, "that is the end of the matter." *Chevron*, 467 U.S. at 842-43.

CONCLUSION

For the foregoing reasons, Dollar General respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-5006

[Filed August 15, 2008]

MARTHA L. BRYANT, *Plaintiff-Appellee,*	)
v.	)
DOLLAR GENERAL CORP., *Defendant-Appellant.*	)

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 05-00840—Robert L. Echols, District Judge.

Argued: March 13, 2008

Decided and Filed: August 15, 2008

Before: MOORE, GILMAN, and SUTTON, Circuit Judges.

COUNSEL

ARGUED: Keith D. Frazier, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, Nashville, Tennessee, for Appellant. Douglas B. Janney III, Nashville, Tennessee, for Appellee. **ON BRIEF:** Keith D. Frazier, Jonathan O. Harris, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, Nashville, Tennessee, for Appellant. Douglas B. Janney, III, Nashville, Tennessee, for Appellee. Jay E. Sushelsky, AARP FOUNDATION LITIGATION, Washington, D.C., for Amicus Curiae.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellee Martha Bryant ("Bryant") prevailed in a jury trial on her claim that Defendant-Appellant Dollar General Corporation ("Dollar General") fired her in retaliation for her exercise of leave guaranteed by the Family and Medical Leave Act ("FMLA"). Dollar General now appeals, contending that the FMLA does not prohibit retaliation against an employee who takes FMLA leave. Bryant has filed a motion to dismiss Dollar General's appeal, arguing that we lack jurisdiction because Dollar General failed to file a post-verdict motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b). Prior to oral argument, the AARP requested leave to file a brief *amicus curiae* in support of Bryant, arguing that federal courts have widely accepted that the FMLA and related federal regulations prohibit retaliation against an employee who takes FMLA leave. We **DENY** Bryant's motion to dismiss Dollar General's appeal, **GRANT** the AARP's motion for leave to file a brief *amicus curiae*, and, because we hold that both the FMLA and its implementing regulations

prohibit employers from retaliating against employees who have exercised FMLA leave, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

Dollar General's appeal presents a purely legal issue—whether the FMLA prohibits retaliation against an employee's exercise of FMLA leave—and accordingly the factual background of the case has little bearing on the outcome of this appeal. As a result, we provide only a brief recitation of the underlying facts.

In 2001, Bryant began working for Dollar General as a senior programmer analyst in its financial marketing department. In 2002, Bryant was diagnosed with Type II diabetes, high blood pressure, and a heart condition, and Bryant's supervisors were aware of her conditions. In early 2004, Dollar General assigned Bryant to the Distribution Center Transaction Project ("DCT Project"), a project that was running behind schedule and missing deadlines. Joint Appendix ("J.A.") at 330 (Trial Tr. at 207).

In early May 2004, Bryant completed paperwork for FMLA leave; shortly afterward, Dollar General began a disciplinary process against her, allegedly for her involvement in an office argument in late April 2004. Bryant took FMLA leave from May 12 to 14 and from May 19 to May 23, 2004, and Dollar General fired her on May 27, 2004. Bryant testified in a deposition and at trial that, at the time Dollar General fired her, a supervisor commented on her health problems, stating

that "[b]ecause of your health, I don't think you can do the job." J.A. at 423 (Trial Tr. at 344).

In October 2005, Bryant filed this lawsuit, claiming that Dollar General had violated the Americans with Disabilities Act ("ADA") and the FMLA. In August 2006, the district court granted Dollar General's motion for summary judgment on Bryant's claims under the ADA and her claim for harassment under the FMLA, but denied the motion as to Bryant's claim for retaliation under the FMLA.

A trial on Bryant's FMLA retaliation claim occurred from October 31, 2006, to November 2, 2006. At the conclusion of the parties' proofs, Dollar General made an oral motion for judgment as a matter of law. Dollar General argued that the relevant statutory section of the FMLA, 29 U.S.C. § 2615, does not prohibit retaliation against the exercise of FMLA leave. J.A. at 481 (Tr. of Oral Argument) (arguing that the statute only "specifically deals with discrimination 'against any individual for opposing any practice made unlawful by this subchapter'") (quoting § 2615(a)(2)). Dollar General noted that a regulation, 29 C.F.R. § 825.220(c), "expanded somewhat" on § 2615 and that the regulation "says[] 'An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave.'" J.A. at 481 (quoting § 825.220(c)). Dollar General's counsel continued, stating that "[l]ooking at the regulations, again it just prohibits discrimination against an employee who has used FMLA leave. Ms. Bryant testified . . . that the first time she exercised rights under FMLA, took FMLA leave, was on May 12th of 2004." J.A. at 482. Dollar General then argued that

"the question then becomes whether the fact that she took six days off . . . is enough to leave a jury a question of fact as to whether her termination was the result of taking that leave. And the defendant's position is that it is not." J.A. at 482 (Trial Tr. at 463).

The district court denied Dollar General's motion, stating that "it's a jury question for the jury to determine whether there is that required causal connection between the adverse employment—that is, her termination—and the fact that she took time off under the Family and Medical Leave Act." J.A. at 494.

Dollar General asserted its statutory interpretation claim again in argument about the jury instructions. Dollar General stated its position that the jury instruction

> should read that instead of "for having exercised rights," it should say "for taking leave under the Family and Medical Leave Act."
>
> The source for that, again, as I explained during the Rule 50 motion, is the statute itself does not provide for a retaliation claim such as the one being brought. The statute only provides for a retaliation claim when an individual has opposed practices.
>
> And the regulations—29, CFR, Section 825.220(c). That is the source for this particular part of the claim. And the first sentence says, "An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave." It does not say for exercising FMLA rights.

> And so . . . we're asking again . . . that the instructions and the claim mirror the language of the regulation.

J.A. at 497 (Trial Tr. at 472) (quoting 29 C.F.R. § 825.220(c)); *see also* J.A. at 515-16 (Trial Tr. at 498-99) (requesting again that "consistent with the regulations, we would ask that rather than 'exercising their rights' that that be 'taking leave'"). The district court declined to make Dollar General's proposed change to the jury instructions and, after the district court instructed the jury, Dollar General again stated its position regarding "the language of the statute," namely "that there should be no instruction, because the FMLA does not provide for a retaliation claim under these circumstances. The only circumstance is when an individual opposes—it's an opposition clause, like under Title VII. And that's the only issue covered by [the] FMLA." J.A. at 528 (Trial Tr. at 572).

The jury returned a verdict in favor of Bryant on the FMLA-retaliation claim and awarded her $73,942.68 in damages.[1] Dollar General made no post-verdict motions. Following the district court's entry of judgment on November 21, 2006, Dollar General timely appealed.

In May 2007, Bryant filed a motion in our court to dismiss Dollar General's appeal for lack of jurisdiction. In June 2007, Dollar General filed a response, and

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[1] The district court later awarded Bryant an additional $73,942.68 in liquidated damages, together with interest, pursuant to 29 U.S.C. § 2617. J.A. at 221-25 (Liquidated Damages Order).

Bryant then filed a reply. On July 30, 2007, a panel of our court filed an order referring Bryant's motion to dismiss to the merits panel.

II. ANALYSIS

A. Bryant's Motion to Dismiss for Lack of Jurisdiction

In her motion to dismiss Dollar General's appeal, Bryant argues that Dollar General's post-verdict failure to renew its pre-verdict Rule 50 motion for judgment as a matter of law deprives our court of jurisdiction under the Supreme Court's decision in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). Dollar General responds by arguing that Bryant reads *Unitherm* too broadly and that in any event our court has jurisdiction to consider Dollar General's statutory interpretation argument through its objections to the jury instructions or by construing its pre-verdict motion as one brought pursuant to Federal Rule of Civil Procedure 12(h)(2), which permits a defendant to raise "at trial" the defense that the plaintiff's has "[f]ail[ed] to state a claim upon which relief can be granted." FED. R. CIV. P. 12(h)(2). We agree with Dollar General and **DENY** Bryant's motion to dismiss because Dollar General's objections to the jury instructions support our jurisdiction in this case.

Dollar General's principal argument on appeal is that the FMLA does not prohibit an employer from firing an employee because that employee took FMLA-guaranteed leave. Dollar General's repetition of this argument in challenging the jury instructions suffices

to preserve the issue for our review. That Dollar General *also* made this argument in a pre-verdict Rule 50 motion for judgment as a matter law and then failed to renew that motion post-verdict is therefore inconsequential, even if we were to accept Bryant's reading of *Unitherm*.[2]

As stated above, Dollar General repeatedly challenged the jury instructions, adopting the same basic position it took in its oral motion for judgment as a matter of law and arguing "that there should be no instruction, because the FMLA does not provide for a retaliation claim under these circumstances. The only circumstance is when an individual opposes—it's an

---

[2] Because we conclude that Dollar General's objections to the jury instructions preserved its claim for appeal, we need not resolve the parties' dispute regarding the effect of *Unitherm* on Dollar General's failure to renew, post-verdict, its Rule 50 motion, in which Dollar General raised a question of law and not a question going to the sufficiency of the evidence. We do note in passing that ample support exists for Dollar General's interpretation that the Supreme Court's decision in *Unitherm* "only addresses pre-verdict motions that are based upon the 'sufficiency of the evidence.'" Appellant Reply Br. at 11. Indeed, the Seventh Circuit has concluded that "in *Unitherm*, the Court was specifically addressing the situation of a litigant seeking a new trial on the basis of the insufficiency of the evidence" and that "[t]he Court did not hold that a court of appeals may not award a new trial on the basis of an erroneous evidentiary decision" in the absence of a post-verdict motion. *Fuesting v. Zimmer, Inc.*, 448 F.3d 936, 939 (7th Cir. 2006). Likewise, in *Metcalf v. Bochco*, 200 F. App'x 635, 637 n.1 (9th Cir. 2006), the Ninth Circuit stated that *Unitherm* "deals with the specific situation of a party's failure to renew, post-verdict, a Rule 50 motion challenging the sufficiency of the evidence in a civil jury trial" and reasoned that "*Unitherm* is inapposite" to Metcalf's case because the appellants did not "challenge the sufficiency of the evidence on appeal."

opposition clause, like under Title VII. And that's the only issue covered by [the] FMLA." J.A. at 528; *see also* J.A. at 497-98, 515-16. We review jury instructions "as a whole to determine whether they fairly and adequately present the issues and applicable law to aid the jury in making its determination," and "the correctness of jury instructions is a question of law, which we review *de novo*." *Micrel, Inc. v. TRW, Inc.*, 486 F.3d 866, 880-81 (6th Cir. 2007). Further, we may reverse a judgment "only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* at 881. Finally, "objections regarding jury instructions must be made at the trial level in order to preserve such objections for appeal." *Libbey-Owens-Ford Co. v. Ins. Co. of N. Am.*, 9 F.3d 422, 427 (6th Cir. 1993); *see also Rand v. Nat'l Fin. Ins. Co.*, 304 F.3d 1049, 1052 (11th Cir. 2002) (stating that "[b]ecause [appellant] objected to the jury instruction at trial, it did not need to include the objection in its new trial motion in order to preserve it for appeal").

B. Whether the FMLA Prohibits Retaliation Against an Employee's Exercise of FMLA Leave

Dollar General's principal argument on appeal is that the statutory text of the FMLA does not prohibit retaliation of the type that Bryant alleged and that the jury found occurred. That is, Dollar General asserts that the FMLA does not bar an employer from firing an employee because that employee took FMLA leave. Dollar General instead contends that the relevant statutory text pertains only to situations in which an employee has "oppos[ed] any practice made unlawful" by the FMLA. 29 U.S.C. § 2615(a)(2). We conclude that

Dollar General's argument has no merit and that the FMLA prohibits an employer from terminating an employee for taking FMLA-guaranteed leave.

Dollar General advances a strictly textual argument that the FMLA does not prohibit retaliation against employees who exercise FMLA leave. The relevant statutory provision is 29 U.S.C. § 2615, titled "Prohibited acts." In full, § 2615 provides:

> (a) Interference with rights
>
> (1) Exercise of rights
>
> It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.
>
> (2) Discrimination
>
> It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.
>
> (b) Interference with proceedings or inquiries
>
> It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—
>
> (1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter;
>
> (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any

right provided under this subchapter; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

29 U.S.C. § 2615.

Also relevant to this issue is 29 C.F.R. § 825.220(c), a federal regulation issued by the Department of Labor interpreting § 2615. *See Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1123 n.9 (9th Cir. 2001) (citing 29 U.S.C. § 2654 and cases concluding that regulations issued pursuant to statutory delegation receive deference under *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984)). Section 825.220(c), titled "How are employees protected who request leave or otherwise assert FMLA rights?," provides:

> (c) An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under "no fault" attendance policies.

29 C.F.R. § 825.220(c). In addition, § 825.220(b) states that "[a]ny violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act."

Dollar General argues that § 2615(a)(2) "only speaks of retaliation for 'opposing any practice made unlawful' by the FMLA, and thus does not encompass Bryant's claim that she was fired for taking FMLA leave." Appellant Br. at 3. Dollar General also contends that "Bryant has never asserted an 'interference' claim under 29 U.S.C. § 2615(a)(1)" and that, although various Sixth Circuit cases have involved claims of retaliation under § 2615(a)(2), "[n]o party has ever asserted to the Sixth Circuit Court of Appeals that the plain language of 29 U.S.C. § 2615(a)(2) does not encompass a claim that one was retaliated against for taking FMLA leave." Appellant Br. at 24, 27. Finally, Dollar General argues that "[t]o the extent 29 C.F.R. § 825.220(c) is read to implement the retaliation prong, § 2615(a)(2), that regulation is manifestly contrary to the plain language of that prong and therefore invalid." Appellant Br. at 43.

Several problems plague Dollar General's argument, including its failure in the district court to challenge § 825.220(c), a federal regulation that expressly interprets the FMLA as prohibiting an employer from discriminating against an employee for using FMLA leave. Although Dollar General argues on appeal that this regulation is invalid, *see* Appellant Br. at 31-32, 43-47, *nowhere* below did Dollar General attack the validity of this regulation. In the portions of its appellate brief challenging the validity of § 825.220(c), Dollar General does not include a single

citation to the Joint Appendix demonstrating that it challenged the regulation below. *See* Appellant Br. at 2, 31-32, 43-47. Indeed, at oral argument, counsel for Dollar General acknowledged that it never cited *Chevron* below in making its repeated statutory interpretation argument.

Despite our general rule that "'[i]ssues not presented to the district court but raised for the first time on appeal are not properly before the court,'" we have "stated that it may be appropriate to consider a new issue on appeal if it is 'presented with sufficient clarity and completeness' for us to resolve the issue.'" *McFarland v. Henderson*, 307 F.3d 402, 407 (6th Cir. 2002) (quoting *J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1488 (6th Cir. 1991), and *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988)) (alteration in original). Further, we have "'most commonly'" exercised our discretion to reach issues not raised below when "'the issue is one of law, and further development of the record is unnecessary.'" *Id.* (quoting *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993)). Given that Dollar General's challenge to the validity of a federal regulation presents a pure a question of law and requires no further development of the record, this case presents an appropriate circumstance for exercising our discretion to reach an issue not raised below. We therefore consider the merits of Dollar General's arguments that the statutory text of the FMLA does not prohibit an employer from taking adverse employment action against an employee who takes FMLA leave, as well as its argument that § 825.220(c), a federal regulation that prohibits that precise conduct, is invalid.

The overwhelming consensus of the case law in the circuits as well as the nature of the statutory scheme and the FMLA's legislative history weigh strongly in favor of rejecting Dollar General's argument that the FMLA itself does not prohibit retaliating against an employee who exercises FMLA leave. Courts throughout the country have observed that the FMLA "was clearly intended to provide [] protection" against "discharg[ing] or discriminat[ing] against an employee for exercising her rights under the Act." *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 160 n.4 (1st Cir. 1998); *see also Staunch v. Cont'l Airlines, Inc.*, 511 F.3d 625, 629 (6th Cir. 2008) (stating that the FMLA "makes it unlawful for employers to . . . retaliate against employees who exercise" their FMLA rights)[3]; *Darby v. Bratch*, 287 F.3d 673, 679 (8th Cir. 2002) (stating that "[t]he FMLA prohibits employers from discriminating against employees for asserting rights under the Act," and that "[t]his prohibition necessarily includes consideration of an employee's use of FMLA leave as a negative factor in an employment action") (footnote omitted); *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1206-07 (11th Cir. 2001) ("[T]o succeed on a retaliation claim, an employee must demonstrate that his employer intentionally discriminated against him in the form of an adverse employment action for having exercised an

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[3] Our circuit has repeatedly accepted such claims of retaliation for taking FMLA leave. *See, e.g.*, *Arban v. West Publ'g Corp.*, 345 F.3d 390, 403 (6th Cir. 2003) (holding that "there was sufficient evidence to support the jury's conclusion that West retaliated against Arban for taking leave under the FMLA"); *Wysong v. Dow Chemical Co.*, 503 F.3d 441, 446-48 (6th Cir. 2007); *Bryson v. Regis Corp.*, 498 F.3d 561, 569-71 (6th Cir. 2007).

FMLA right."); *King v. Preferred Tech. Group*, 166 F.3d 887, 891 (7th Cir. 1999) ("[T]he FMLA also affords employees protection in the event they are discriminated against for exercising their rights under the Act.").

The structure of the FMLA itself and its legislative history also strongly support interpreting § 2615(a)(2) as prohibiting retaliation against employees who use FMLA leave. Section 2612(a)(1) "entitles qualifying employees to twelve weeks of unpaid leave each year if, among other things, an employee has 'a serious health condition that makes the employee unable to perform the functions of the position of such employee.'" *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 719 (6th Cir. 2003) (quoting 29 U.S.C. § 2612(a)(1)(D)). After an employee takes such leave, the FMLA generally requires that, upon the employee's return, the employer restore the employee "to the position of employment held by the employee when the leave commenced" or restore the employee "to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." 29 U.S.C. § 2614(a)(1). As the Eighth Circuit has observed, "the FMLA does not provide leave for leave's sake, but instead provides leave with an expectation an employee will return to work after the leave ends." *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972, 978 (8th Cir. 2005). Any "right" to take unpaid leave would be utterly meaningless if the statute's bar against discrimination failed to prohibit employers from considering an employee's FMLA leave as a negative factor in employment decisions. Interpreting § 2615(a)(2)'s ban on discrimination in a manner that would permit employers to fire employees

for exercising FMLA leave would undoubtedly run contrary to Congress's purpose in passing the FMLA. *See Cavin*, 346 F.3d at 719 (noting that "Congress enacted the FMLA because . . . 'there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods'" and that "[t]he FMLA 'accommodates the important societal interest in assisting families by establishing minimum labor standard[s] for leave'") (quoting 29 U.S.C. § 2601(a)(4) and H.R. Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *21). Indeed, the legislative history to the FMLA summarized the testimony of numerous individuals who lost their jobs after taking medical and family leave. H.R. Rep. No. 103-8(I), 103d Cong., 1st Sess. 1993, at *26 ("There are many similar stories of workers who have been fired when their employers refused to provide an adequate leave of absence. These accounts, and many others like them presented to the committee over the past eight years, illustrate the human and economic costs of terminating employees at times of great family need.").

In light of the foregoing, we conclude that the FMLA itself prohibits employers from taking adverse employment actions against employees based on the employee's exercise of FMLA leave. We thus also conclude that the Department of Labor's interpretation of § 2615 in § 825.220 is a reasonable interpretation of the statute and a valid exercise of agency authority. Dollar General acknowledges that Congress delegated authority to the Secretary of the Department of Labor to "prescribe such regulations as are necessary to carry out" the Act, 29 U.S.C. § 2654, and that the Department of Labor's interpretation receives

deferential review under *Chevron*, Appellant Br. at 43-45. Dollar General simply argues that § 825.220(c) "is 'manifestly contrary to' the plain language of § 2615(a)(2)" in that "the regulation would alter § 2615(a)(2) in a fundamental way [because] it would rewrite § 2615(a)(2) to proscribe retaliation for taking FMLA leave, even though § 2615(a)(2) only prohibits retaliation for opposing a practice made unlawful by the FMLA." Appellant Br. at 45, 46-47. As we have explained, in light of the overwhelming consensus in the courts that the FMLA *does* prohibit such retaliation, we disagree that the plain text fails to afford employees protection from retaliation against the exercise of FMLA leave. Further, the structure and purpose of the Act, as well as its legislative history, support our interpretation that Congress intended the FMLA to prohibit employers from considering an employee's use of FMLA leave as a negative factor in employment decisions.

Although Dollar General asserts that no other defendant has advanced its statutory interpretation argument and that its attack on the existence of a retaliation claim for taking FMLA leave under § 2615 presents a case of first impression, the asserted failure of other defendants to raise this argument may not be an accident. Dollar General's reading of the statute would essentially render the FMLA a nullity. Their interpretation would require us to believe that—despite including statutory provisions granting eligible employees the "rights" to take up to twelve weeks of unpaid leave in a twelve-month period and to be restored to their prior positions or equivalent positions upon their return—Congress wished to erect no obstacle to prevent employers from terminating

employees who exercise their newly granted "rights." Established principles of statutory interpretation caution against interpretations that "lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress." *Vergos v. Gregg's Enters., Inc.*, 159 F.3d 989, 990 (6th Cir. 1998) (citing *United States v. Turkette*, 452 U.S. 576, 580 (1981)). In enacting the FMLA, Congress plainly stated that "the purpose of this Act" included establishing a right for "employees to take reasonable leave for medical reasons." 29 U.S.C. § 2601(b). Interpreting the language in § 2615(a)(2), which bars employers from discriminating against employees, in a manner that would permit employers to terminate employees for taking qualifying medical leave is fundamentally inconsistent with the clear, unambiguous purpose of the FMLA. As a result, we must reject Dollar General's argument.

III. CONCLUSION

For the reasons discussed above, we **DENY** Bryant's motion to dismiss for lack of jurisdiction, **GRANT** the AARP's motion for leave to file a brief *amicus curiae*, and **AFFIRM** the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-5006

[Filed August 15, 2008]

MARTHA L. BRYANT, Plaintiff-Appellee,	)
v.	)
DOLLAR GENERAL CORP., Defendant-Appellant.	)

Before: MOORE, GILMAN, and SUTTON, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that plaintiff Martha Bryant's motion to dismiss defendant Dollar General Corp.'s appeal for lack of jurisdiction is DENIED, AARP's motion for leave to file a brief *amicus curiae* is GRANTED, and the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CASE #: 3:05-0840

[Filed November 2, 2006]

MARTHA L. BRYANT	)
	)
VS.	)
	)
DOLLAR GENERAL CORPORATION	)
	)

JUDGE ROBERT L. ECHOLS

JUDGMENT IN A CIVIL CASE

√ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

○ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the jury found as follows:

– The jury found that Defendant, Dollar General Corporation terminated Plaintiff, Martha L. Bryant, in retaliation for her taking leave under the Family and Medical Leave Act.

– The jury further found that the total amount of any wages, salary, and employment benefits Plaintiff lost as a result of Defendant having terminated Plaintiff on May 27, 2004, for her having exercised her rights under the Family and Medical Leave Act to be $73,942.68.

IN ACCORDANCE WITH THE VERDICT OF THE JURY, JUDGMENT IS HEREBY ENTERED IN FAVOR OF THE PLAINTIFF, MARTHA L. BRYANT, IN THE AMOUNT OF $73,942.68. THE COURT WILL DETERMINE THE ISSUE OF LIQUIDATED DAMAGES BY SEPARATE ORDER.

November 2, 2006
DATE

KEITH THROCKMORTON, CLERK

BY: PAT LAVORINI
DEPUTY CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:05-0840

[Filed November 2, 2006]

MARTHA L. BRYANT	)
	)
Plaintiff,	)
	)
v.	)
	)
DOLLAR GENERAL CORPORATION,	)
	)
Defendant.	)
	)

Judge Echols

VERDICT FORM

After full consideration of the Jury Charge, we, the Jury, unanimously find as follows:

Question No. 1: Did Defendant, Dollar General Corporation, terminate Plaintiff, Martha L. Bryant, in retaliation for her taking leave under the Family and Medical Leave Act?

Yes ✓ No ____

(If you answered "Yes" in response to Question No. 1, proceed to Question No. 2. If you answered "No" in response to Question No. 1, skip Question No. 2, have your foreperson sign and date this Verdict Form and inform the marshal that you are ready to return to the courtroom.)

QUESTION NO. 2: If you answered "Yes" to Question No. 1, what is the total amount of any wages, salary, and employment benefits Plaintiff lost as a result of Defendant having terminated Plaintiff on May 27, 2004 for her having exercised her rights under the Family and Medical Leave Act?

$ 73,942.68

(You have finished your deliberations. Have your foreperson sign and date this Verdict Form and inform the marshal that you are ready to return to the courtroom.)

/s/
FOREPERSON

11-2-06
DATE

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:05-0840

[Filed August 31, 2006]

MARTHA L. BRYANT,	)
	)
Plaintiff,	)
	)
v.	)
	)
DOLLAR GENERAL CORPORATION,	)
	)
Defendant.	)
	)

Judge Echols

ORDER

For the reasons set forth in the Memorandum issued contemporaneously herewith, Defendant Dollar General Corporation's Motion for Summary Judgment (Docket Entry No. 18) is hereby GRANTED IN PART and DENIED IN PART. The Motion is GRANTED with respect to Plaintiff's claims under the Americans with Disabilities Act and any claim for harassment

under the Family and Medical Leave Act, but DENIED with respect to Plaintiff's retaliation/discrimination claim under the Family and Medical Leave Act.

This Court has previously scheduled the pretrial conference for September 25, 2006 at 1:30 p.m. with the trial to commence on October 31, 2006 at 9:00 a.m. Those dates and times are hereby reconfirmed.

This case is hereby returned to the Magistrate Judge for further case management and to ensure the case is ready for trial as scheduled.

It is so ORDERED.

/s/
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:05-0840

[Filed August 31, 2006]

MARTHA L. BRYANT,	)
	)
Plaintiff,	)
	)
v.	)
	)
DOLLAR GENERAL CORPORATION,	)
	)
Defendant.	)
	)

Judge Echols

MEMORANDUM

Pending before the Court is Defendant Dollar General Corporation's ("Dollar General") Motion for Summary Judgment (Docket Entry No. 18), to which Plaintiff Martha L. Bryant ("Bryant") has responded in opposition (Docket Entry No. 26) and Defendant has replied (Docket Entry No. 29).

I. FACTS

Bryant brought this suit alleging violations of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA"), and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. ("FMLA") after she was terminated from her employment as a Senior Programmer Analyst for Dollar General. Construed in Plaintiff's favor, the facts underlying her employment with, and termination from, Dollar General are, in rough chronology, as follows.

Bryant was hired by Dollar General as a Senior Programmer/Analyst in July 2001. (Def. SOF ¶¶ 1 & 2).[1] Plaintiff was interviewed for the position by Tonya Tucker ("Tucker"), who became Bryant's immediate supervisor. (*Id.* ¶ 3). Tucker, in turn, reported to Pamela Campbell ("Campbell"), who was the Director of Systems Development subsection within the Information Services ("IS") Department. (*Id.* ¶ 4). There were approximately twenty-five employees in Campbell's department. (Campbell Depo. at 4).

In 2002, Dollar General provided employees with the opportunity to go to a health fair sponsored by Vanderbilt Hospital. (Def. SOF ¶ 5). This was a voluntary program and employees who attended could have their blood sugar and blood pressure measured. (*Id.* ¶¶ 6-7). Bryant attended the fair and was later telephoned and told that her blood sugar level was elevated and she needed to see a doctor immediately

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[1] References to statement of facts ("SOF") are to such statements when undisputed.

since she might be a diabetic. (*Id.* ¶¶ 7-9). Bryant visited her doctor and learned that not only was she a diabetic, but that she had high blood pressure as well. (*Id.* ¶ 10).

In October 2002, Bryant also learned she had a "heart condition" in the form of "heart rhythm problems" which she describes as pressure or the feeling of "butterflies" in her chest. This condition causes her heart to race or skip beats and leads to shortness of breath. Bryant takes prescription medicine for this condition. (Bryant Depo. at 85-87).

Bryant kept Tucker abreast of her medical conditions since, at the time, the two were friends. (Def. SOF ¶¶ 12, 14). Bryant believes Tucker was legitimately concerned for Bryant's well-being and was supportive at the time Bryant learned of her condition. (*Id.* ¶ 14). Even after Tucker became aware of Bryant's health problems, Bryant's performance reviews remained "very good." (*Id.* ¶ 15).

In early 2004, Bryant became involved in the Distribution Center Transaction Project ("DCT Project") which entailed converting the computer language system that tracks the inventory of goods in the Distribution Centers. (Def. SOF ¶¶ 16, 18). As part of this project, programs for tracking inventory at the Distribution Centers had to be written in Oracle, and then those programs had to be tested. Bryant worked on this project with several co-workers and the project

manager was Jeffrey Joseph ("Joseph") who was later replaced by Tucker. (*Id.* ¶¶ 19-21).[2]

In April of 2004, Campbell attended a training session in Human Resources which covered FMLA leave in which she learned that in addition to long-term leave, an employee could take leave on an intermittent basis. Campbell told Bryant, along with another of her employees, Rhonda Austin (who suffered from migraine headaches) that they might be eligible for such leave and they should visit the Human Resources Department. (*Id.* ¶¶ 22-24). Bryant claims that when Campbell talked with her about intermittent leave, Campbell stated that "we should have done this before," apparently a reference to Bryant's diabetes diagnosis in 2002. (*Id.* ¶ 27).

After speaking with Campbell, Bryant went to Human Resources and spoke with Diane Short. Short gave Bryant some paperwork for her doctor to fill out and then explained the FMLA to Bryant, telling her she could use FMLA leave for doctor's appointments and testing related to her diabetes and heart condition. (Pf. Depo. at 83-85). It was Dollar General's idea that Bryant complete FMLA paperwork in April 2004, not Bryant's. (Def. SOF ¶ 31).

Bryant had a vacation scheduled for the first week of May 2004. Prior to her taking this vacation, Tucker and English had a conversation with Plaintiff about

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[2] By this time, Leonard English ("English") had replaced Tucker as Bryant's direct supervisor. However, while working on the DCT project, Bryant reported to Tucker. (*Id.* ¶ 22).

meeting deadlines. (*Id.* ¶ 37).[3] Tucker believed Plaintiff had missed at least two different deadlines for reports, even though those deadlines had been extended. Tucker also was concerned about another report but Bryant explained that she had not been provided the information necessary to complete the report. (Tucker Depo. at 15-16; Bryant Depo. at 63-70).

Bryant's last day at work prior to her scheduled vacation was April 30, 2004. (*Id.* ¶ 36). On that day she and several co-workers were to work as a team on part of the DCT project in a conference room which was dubbed the "war room." The employees were instructed by Tucker not to leave before the project was completed. (*Id.* ¶ 45).

While the employees were working in the war room, a heated exchange erupted among several of the employees, including Bryant. (*Id.* ¶ 42). The argument was loud enough that others could hear the exchange outside the war room.

Two of the employees, Libby Elizer ("Elizer") and Debbie Mays ("Mays"), believed they had already completed their tasks on the project but Bryant had not completed her work. (*Id.* ¶¶ 45, 46). Mays expressed to Bryant her view that she did not think it was fair that she had to stay late to do work that was not hers, but instead was Bryant's work. (*Id.* ¶ 47). Bryant responded by stating she "was tired of this mess," and that she was "sorry that you are blaming it

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[3] Tucker and English also had several discussions with other employees about meeting deadlines.

on me when I didn't tell you that you had to work late." (*Id.* ¶ 48). Because progress was not being made on the project, Joseph told everybody to go home. (*Id.* ¶ 49). Plaintiff went home and began her scheduled vacation. (*Id.* ¶ 50).

The following Monday, May 3, 2004, Joseph, Mays, Elizer and another employee went to Tucker to discuss with her the events of the previous Friday. (*Id.* ¶ 51). Although the parties dispute whether it was reported to Tucker that Bryant had started the argument, Tucker believed Bryant had started the argument and then continued the argument with Mays after Mays had backed down. (Tucker Depo. at 47, 53).

On May 7, 2004 (while still on vacation), Bryant turned in completed FMLA paperwork. She did not tell either Campbell or Tucker the amount of FMLA leave she intended to take because she did not know the amount she would need to take, and, in fact, was not planning on using such leave at that time. (*Id.* ¶¶ 32-34).

Upon Bryant's return to work, she was placed on a written progressive counseling. (Def. SOF ¶ 55). Mays, however, did not receive any written counseling.

According to Tucker, Bryant was counseled about her involvement in the argument and her missing deadlines. (Tucker Depo. at 46-47). Bryant claims she was counseled about her "personality problem" for participating in the argument and for leaving work the afternoon of the argument without finishing the project. (Bryant Depo. at 108). Bryant refused to sign

the written copy of her progressive counseling. (Def. SOF ¶ 59).[4]

English began a log of Bryant's activities which he titled "Marty Bryant's Progressive Counseling" which recorded discussions management had with Bryant. The log also tracked the time Bryant was away from work for her medical conditions and included entries such as "out sick," "to the ER for chest pains," "running a EKG & CT to make sure she wasn't having a light stroke," "going to the doctor's office during lunch. She returned with a doctor's excuse from work to be out for 3 days," and "going to the doctor before she came into work." That log also indicates that on the day following the written progressive counseling session, Tucker and English met with Bryant and "stressed that she should focus on getting the work done and fill out the worksheet for FMLA." (English Depo. Ex. 2).

On May 19 to May 23, 2004, Bryant took FMLA leave for her elevated blood pressure. At some point around this same time frame, Tucker learned that Bryant had been discussing her progressive counseling with her co-workers.[5] Several employees thought that

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[4] In writing her up, Bryant claims that Dollar General skipped two steps in its progressive discipline policy. (Pf. Response to Def. SOF ¶ 60).

[5] The parties dispute whether Tucker approached the employees or the employees approached Tucker. That dispute is irrelevant for present purposes, except to the extent that it could show Bryant was treated differently than other employees because, unlike others who received progressive discipline, an inquiry was made about whether Bryant talked about receiving discipline to her co-workers.

discussing progressive disciplines was not a big deal since it was not uncommon for employees to discuss progressive discipline among themselves. (DiStefano Depo. at 33-37; Dishman Depo. at 14-16).

Tucker told Campbell what she had learned. Campbell did not believe Bryant should have discussed her progressive discipline with co-workers. Tucker, English and Short then met with Bryant and Bryant was told that she was to keep her progressive counseling confidential. (Def. SOF ¶¶ 69-72; Bryant Depo. at 132-133).

On May 27, 2004, within a few days of that meeting, Bryant told Stephen Dishman, a co-worker, that she had been instructed not to speak about her progressive counseling. Either then or on an earlier occasion, Bryant also told Dishman that "her hand had been slapped" for discussing the counseling, and that "she had been told not to discuss it." (Def. SOF ¶ 72).

That same afternoon, Bryant was informed that her employment was being terminated. (*Id.* ¶ 78). Bryant was told that Dollar General had learned she had talked with Dishman about her progressive counseling document after she had been told to keep the progressive counseling confidential. (Def. SOF ¶ 79). In the Personnel Action form filled out by English, he checked the box for "not meeting performance standards." He did not check the boxes for "inappropriate conduct," "insubordination," or "violation of company policy/procedure," although in the comments section he did write that "employee shared confidential information after being told not to do so." (English Depo. Ex. 6).

Dollar General claims that Bryant was terminated because Dollar General had learned from Dishman that Bryant had continued to discuss her progressive counseling, even though she had just been told not to discuss the matter. Bryant claims she was terminated because Dollar General regarded her as disabled and in retaliation for exercising her rights under the FMLA.

Plaintiff asserts that her diabetes, high blood pressure and heart condition led Dollar General to believe she was substantially limited in her ability to work. (Def. SOF ¶ 82). With regard to that belief, Bryant testified in her deposition as follows:

> Q. So it sounds like in your mind, the activity that Dollar General viewed you as being limited in was the activity of working. Is that fair to say?
> A. Working at that position, I would think.
> Q. And what position was that?
> A. Senior programmer/analyst.

(Bryant Depo. at 154). Plaintiff has no idea how Dollar General perceived her abilities to perform other jobs outside of Dollar General's IS Department. (Def. SOF ¶ 94).

Bryant also testified that at the time she was terminated, Campbell told her that "because of the stress of this company – and the stress is going to get worse. Because of your health, you can't do the job" or "you're not going to be able to do the job." (*Id.*; Bryant Depo. at 153). Bryant claims her supervisors also told her numerous times, "we know you are sick and we

don't want to make you sicker" and those statements were made towards the last six months of Bryant's employment. (*Id.* at 164-68, 194-95). Bryant further testified she believed Dollar General's forcing her to complete FMLA papers two years after it knew of her conditions demonstrated that Dollar General regarded her as disabled. (*Id.* 170-71, 179-180).

II. STANDARD OF REVIEW

A party may obtain summary judgment if the evidence establishes there are not any genuine issues of material fact for trial and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Covington v. Knox County School Sys.*, 205 F.3d 912, 914 (6th Cir. 2000). The moving party bears the initial burden of satisfying the court that the standards of Rule 56 have been met. *See Martin v. Kelley*, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact that is disputed. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986); *Covington*, 205 F.3d at 914 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). If so, summary judgment is inappropriate.

To defeat a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue of material fact for trial. If the party does not so respond, summary judgment will be entered if appropriate. Fed. R. Civ. P. 56(e). The nonmoving party's burden of providing specific facts demonstrating that there remains a genuine issue of material fact for trial is triggered once the moving party shows an absence of

evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325. A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. In ruling on a motion for summary judgment, the Court must construe the evidence in the light most favorable to the nonmoving party, drawing all justifiable inferences in its favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. LEGAL ANALYSIS

A. Claims under the ADA

Bryant claims that she was terminated because she was perceived as disabled within the meaning of the ADA. She also claims she was subjected to a hostile work environment in violation of the ADA and was not offered a reasonable accommodation as required by the ADA.

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). "Merely having an 'impairment' does not make one disabled for purposes of the ADA." *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 195 (2002). Instead, to establish a disability within the meaning of the ADA a plaintiff must establish "(A) a physical or mental impairment that substantially

limits one or more of the major life activities of such individuals; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Major life activities are ""functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(i). One is "substantially limited" if he or she is "(1) unable to perform a major life activity that the average person in the general population can perform; or (2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j)(1).

In this case, Plaintiff claims she was perceived as disabled with regard to the major life activity of working. The only evidence before the Court is that if Plaintiff was in fact perceived as disabled in relation to working, that perception was limited to the job of a computer programmer/analyst at Dollar General. This perception dooms Plaintiff's ADA claim.

The Sixth Circuit "has repeatedly held that the major life activity of working is not substantially limited simply because an employee's physical or psychological impairment prevents him from performing a particular job." *Agnew v. Heat Treating Serv. of America*, 2005 WL 3550532 at *5 (6th Cir. 2005)(collecting cases). "To be substantially limited in the major life activity of working, then, one must be

precluded from more than one type of job, a specialized job, or a particular job of choice." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999).

In this case, both Bryant and her supervisors tied Bryant's alleged disability to the job of a senior programmer/analyst at Dollar General and the stress entailed in that position. As indicated previously, in her deposition, Bryant testified:

> Q. So it sounds like in your mind, the activity that Dollar General viewed you as being limited in was the activity of working. Is that fair to say?
> A. Working at that position, I would think.
> Q. And what position was that?
> A. Senior programmer/analyst.

(Bryant Depo. at 154). Bryant also testified that Campbell told her "because of the stress of this company – and the stress is going to get worse. Because of your health, you're not going to be able to do the job." (*Id.*).

Plaintiff has no idea how Dollar General perceived her abilities to perform other jobs outside of Dollar General. (Def. SOF ¶ 94). Even in her brief in opposition to the Motion for Summary Judgment, Bryant reiterates the notion that the stress at Dollar General (as opposed to at some other company) was the reason she was perceived as being unable to work, writing:

> [I]t is significant that Campbell told Ms. Bryant on the afternoon that she was fired that,

> "[b]ecause of the stress *in this company* – and the stress is going to get worse. Because of your health, you're not going to be able to do the job." (Bryant 154). Campbell also may have told Ms. Bryant that "*our job* at Dollar General is always stressful." (Campbell 75). Likewise, English testified that "[w]e are all under stress [at Dollar General]." (English 51).

(Docket Entry No. 26 at 20).[6]

"Proving that an employee is regarded as disabled in the major life activity of working takes a plaintiff to the farthest reaches of the ADA." *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2001). "Not only must a plaintiff demonstrate that an employer thought [s]he was disabled, [s]he must also show that the employer thought that h[er] disability would prevent h[er] from performing a broad class of jobs." *Id.*

In quoting the foregoing, the Court recognizes that the Sixth Circuit in *Ross* also indicated that whether an employer regarded an employee as being disabled in the major life activity of working "is a question

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[6] Bryant attempts to utilize these deposition excerpts to show that her tasks were not limited to computer programming, but were much broader than that. However, there is no evidence to support such a contention and her own testimony indicates that her job as Senior Programmer/Analyst related solely to drafting and editing computer programming and performing tasks to analyze, test, implement and fix computer programs with respect to the financial and inventory side of Dollar General. (Bryant Depo. at 25-26). This job fit with her educational background (a degree in data processing) and her prior employment in the computer field. (*Id.* at 10-11).

embedded almost entirely in the employer's subjective state of mind" *id.* at 709 and hence not generally a basis for summary judgment. However, Plaintiff reads *Ross* too broadly in suggesting that the degree to which an employer views an employee's alleged disability is always a jury question. (Docket Entry No. 26 at 19-20). *See e.g., Dunaway v. Ford Motor Corp.*, 134 Fed. Appx. 872, 877 n. 3 (6th Cir. 2005) (*Ross* does not preclude summary judgment where plaintiff "did not even present a modicum of evidence the employer perceived him as disabled under the ADA"); *McElroy v. Philips Medical Sys.*, 127 Fed. Appx. 161, 169 (6th Cir. 2005) ("Unlike *Ross*, the evidence presented in this case is not sufficient to lead a rational trier of fact to find Philips believed McElroy had a disability that would prevent him from performing a broad class of jobs"); *Cotter v. Ajilon Services, Inc.*, 287 F.3d 593, 601 (6th Cir. 2002) (distinguishing *Ross* and concluding "[u]ltimately, Cotter has not offered sufficient evidence to support a conclusion by a rational trier of fact that he was disabled or regarded as disabled within the meaning of the ADA"); *Rodgers v. Norfolk Southern Corp.*, 304 F. Supp. 2d 961, 971 (S.D. Oh. 2003) (even in light of *Ross*, summary judgment was appropriate where "the undisputed evidence shows that the Defendant concluded Plaintiff was unable to perform one particular job, that of extra board engineer").

In this case, the only evidence before the Court relates to Bryant's ability to do the Senior Programmer/Analyst position at Dollar General. However, to establish her ADA claim, Plaintiff must show that Dollar General "perceived h[er] as unable to work in a broad class of jobs or a broad range of jobs in various classes." *Moorer v. Baptist Memorial*

Healthcare Sys., 398 F.3d 469, 480 (6th Cir. 2005). Likewise, to establish a failure to accommodate or a hostile work environment claim under the ADA, plaintiff must have (or be regarded as having) a disability within the meaning of the ADA. *See, Gerton v. Verizon South, Inc.*, 145 Fed. Appx. 159, 164 (6th Cir. 2005)("[i]f the plaintiff fails to establish a prima facie case, it is unnecessary to address the question of reasonable accommodation"); *Huge v. General Motors Corp.*, 62 Fed. Appx. 77, 81 (6th Cir. 2003)("Inasmuch as the existence of a statutorily-defined disability is a requirement of accommodation and discrimination claims under the ADA, as well as for any hostile environment claim under the statute . . . the absence of a triable issue with regard to disability is sufficient to affirm the district court's entry of summary judgment on all of those claims").[7]

Proof of a disability is a threshold requirement to prove a violation of the ADA. *Burns v. Coca-Cola Enterp. Inc.*, 222 F.3d 247, 253 (6th Cir. 2000). Plaintiff has not established that she was disabled, or perceived as disabled, within the meaning of the ADA and therefore Defendant is entitled to summary judgment on her ADA claims.

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[7] Even without the requirements for a *prima facie* case, Plaintiff's hostile work environment and retaliation claim would fail, the former because there is no showing that the harassment was pervasive or severe such as to alter the conditions of her employment, see, *Trepka v. Board Of Educ.*, 28 Fed. Appx. 455, 461 (6th Cir. 2002) and the latter because it does not appear that an employer in the Sixth Circuit has to accommodate a perceived disability. *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 467 (6th Cir. 1999).

B. FMLA RETALIATION/DISCRIMINATION CLAIM[8]

The FMLA entitles an eligible employee up to twelve weeks of leave during any twelve month period if the employee has a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(C)&(D). "The term 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11).

Under the Regulations, "[a]n employer is prohibited from discriminating against employees . . . who have used FMLA leave" and "cannot use the taking of FMLA leave as a negative factor in employment actions[.]" 29 C.F.R. § 824.220(c). "This prohibition includes retaliatory discharge for taking leave." *Arban v. West Publ'g Co.*, 345 F.3d 390, 403 (6th Cir. 2003).

In *Skrjanc v. Great Lakes Power Service Co.*, 272 F.3d 309, 315 (6th Cir. 2001), the Sixth Circuit

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[8] The Sixth Circuit "recognizes two distinct theories for recovery under the FMLA: (1) the 'entitlement' or 'interference' theory arising from 29 U.S.C. § 2615(a)(1); and (2) the 'retaliation' or 'discrimination' theory arising from 29 U.S.C. § 2615(a)(2)." *Killian v. Yorozu Automotive Tennessee, Inc.*, 454 F.3d 549, 555-56 (6th Cir. 2006) (quoting *Hoge v. Honda of America Mfg., Inc.*, 384 F.3d 238, 244 (6th Cir. 2004)). This case presents a retaliation/discrimination theory of recovery under the FMLA and those terms are used together or interchangeably herein.

indicated that a court should apply the *McDonnell Douglas* burden-shifting framework to FMLA retaliation claims that are based upon indirect evidence. Under that framework, the Plaintiff must first establish a *prima facie* case, with the burden then shifting to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. *Gibson v. City of Louisville*, 336 F.3d 511, 513 (6th Cir. 2003). If the employer articulates such a reason, the "Plaintiff must show that this nondiscriminatory reason was in fact pretextual and that unlawful discrimination was the real reason for the adverse action." *Id.* "To survive summary judgment, [Plaintiff] must provide sufficient evidence to show that the exercise of her FMLA rights was a motivating factor in her discharge." *Heady v. U.S. Enrichment Corp.*, 146 Fed. Appx. 766, 769-770 (6th Cir. 2005).

To establish a *prima facie* case of retaliation/ discrimination under the FMLA, it is incumbent upon Plaintiff to show (1) that she engaged in statutorily protected activity; (2) that she suffered an adverse employment action; and (3) that there was a causal connection between the protected activity and the adverse employment action. *Id.* Sixth Circuit precedent provides that "[t]he burden of establishing a prima facie case in a retaliation action is not onerous, but one easily met." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000).

Given that the burden is not onerous, this Court finds that Plaintiff has presented sufficient evidence to establish a *prima facie* case. There is no question but that Plaintiff suffered an adverse employment action

since she was terminated. As for engaging in statutorily protected activity, Bryant took FMLA leave just a few days before her termination.

The primary area of contention with regard to a *prima facie* case is the question of a causal connection between Plaintiff's termination and her request for FMLA leave. The Court concludes that this is a jury question because material issues of fact exist in the record. Such facts include:

- Tucker and English commenting to Bryant in the last few months of her employment that they knew she was sick and didn't want to make her sicker.

- Tucker and English had discussed Bryant missing deadlines and Bryant had been counseled about this problem. Bryant faced another deadline on April 30, 2004 in relation to finishing her assigned tasks on the DCT project which the group was working on that day. The deadline was missed after Bryant had an argument with her co-workers about who was causing a lack of progress in meeting the deadline that day. The next day, Plaintiff began her scheduled week's vacation. Bryant took FMLA leave from May 19 to May 23, 2004. She was terminated on May 27, 2004.

- English's "Progressive Counseling Notes" which contain references to the times Bryant was away from work after the progressive counseling session and which contained a

specific notation that Bryant was urged to complete her FMLA paperwork.

- Campbell telling Bryant on the afternoon of her termination "because of the stress of this company – and the stress is going to get worse. Because of your health, you can't do the job" or "you're not going to be able to do the job.

- The temporal proximity (a few days) between Plaintiff's discharge and her taking of FMLA leave.

Taken in isolation, these events and statements may appear innocuous and may be explained away. One can be viewed as incongruous with an intent to retaliate, e.g., it would not be expected that one would be encouraged to fill out FMLA paperwork, only to be retaliated against for taking FMLA leave shortly thereafter. However, taken together a jury could believe these events paint a picture of possible retaliation based upon Bryant having availed herself of her statutory right to FMLA leave.

Defendant asserts that even if Bryant can establish a *prima facie* case of retaliation under the FMLA, it has advanced a legitimate non-discriminatory reason for Plaintiff's discharge which Plaintiff cannot show to be pretextual. "A plaintiff can demonstrate pretext by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Dew v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000).

In this case, jury questions are presented on the issue of whether the proffered reason for dismissal – Bryant's discussion of progressive discipline with Dishman – actually motivated Dollar General's actions or had any basis in fact. In the Personnel Action Form, English checked the box for "not meeting performance standards," not the boxes for "inappropriate conduct," "insubordination," or "violation of company policy/procedure." While the comment section states that Bryant improperly shared confidential information, that is not the checked reason for her dismissal. From this evidence, a jury could determine that the reason for dismissal was not, in fact, Bryant's discussion of progressive counseling. *See, Cicero v. Borg-Warner Automotive, Inc.*, 280 F.3d 579, 592 (6th Cir. 2002)("Shifting justifications over time call the credibility of those justifications into question").

Additionally, it appears it was common for employees to discuss their progressive discipline with each other and there apparently was no specific policy prohibiting such conversations. A jury question is presented as to whether the actual reason for terminating Bryant was her discussion of her progressive counseling with other employees, particularly since it appears that no other employee was fired for such discussion.

Further, there is an issue as to whether Bryant actually discussed her progressive discipline with Dishman in violation of the instructions given to her. A fair reading of Bryant's deposition testimony suggests that she understood she could not talk any further about the progressive counseling document and that on the morning of her firing she told Dishman

that she had had a meeting but that she could not talk about her progressive discipline. (Bryant Depo. at 134-141). If such testimony is to be believed and Dollar General's testimony to the contrary rejected, a jury could conclude that the given reason for Bryant's discharge has no basis in fact.

In sum, jury questions are presented on the issues of the causal connection between Bryant's taking of FMLA leave and her discharge and whether the reason given for her discharge was pretextual. As such, summary judgment will not be granted on Bryant's FMLA retaliation claim.

One more issue needs to be addressed. Defendant argues in its brief in support of its Motion for Summary Judgment that Bryant cannot establish a claim for FMLA harassment because such a cause of action does not exist and, even if it did, Bryant has presented insufficient evidence to prevail on such a claim. Bryant does not respond to those arguments and it is not clear from her Complaint that she is even claiming FMLA harassment. However, even if she is maintaining such a claim, Defendant is entitled to summary judgment.

Some courts have referenced a claim for FMLA harassment, albeit with little or no discussion. *See, McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1306 (1999) (plaintiff claims "retaliatory harassment for attempting to exercise her FMLA rights"); *Dage v. Time Warner Cable*, 395 F.Supp.2d 668, 676 (S.D. Ohio, 2005) ("Plaintiff has now abandoned any claim based on a theory of retaliatory harassment under FMLA"); *Whitlow v. Visiting Nurse Ass'n*, 420

F.Supp.2d 92, 114 (W.D.N.Y. 2005) ("plaintiff requests for the first time in this litigation that the court construe the complaint to include a claim for discrimination or harassment under the FMLA").

Assuming such a claim exists independent of a retaliation or interference claim under 29 U.S.C. §§ 2614 & 2615, and ignoring that Plaintiff has abandoned such a claim by failing to respond to Defendant's arguments, *Dage*, 395 F.Supp.2d at 676 (collecting cases), the Court finds insufficient evidence in the record to present a jury question on whether Bryant was harassed for taking FMLA leave.

To establish harassment in the employment context, Plaintiff must show that the harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993). Factors to be considered in determining whether the harassment is severe or pervasive include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002).

In this case, Plaintiff identified the following as harassing conduct: (1) Tucker talking to Plaintiff about missing deadlines; (2) Tucker telling Plaintiff that "I had to get this stuff done no matter whether I was sick or not"; (3) English questioning Plaintiff about taking time off after she had brought him a doctor's note; (4) comments by Tucker and English to Plaintiff's

co-workers not to help Plaintiff with her work; and (5) Tucker and English "talking with people and getting false comments" from her co-workers." (Bryant Depo. at 184-192).

As Defendant correctly observes, none of these allegations come anywhere close to the types of behavior that the courts have found to be severe and pervasive harassment. The first three of these alleged acts – discussions with Plaintiff about her deadlines and a discussion with Plaintiff about time off – do not constitute harassment as that term has come to be defined in the employment context. *See, Keever v. City of Middletown*, 145 F.3d 809, 813 (6th Cir. 1998) ("Conversations between an employee and his superiors about his performance does not constitute harassment simply because they cause the employee distress"). The other two alleged acts were not even directed at the Plaintiff but were comments to co-workers. In any event, there is no evidence Plaintiff "was ridiculed or insulted because of h[er] medical condition to the point that it permeated h[er] working environment." *Plautz v. Potter*, 156 Fed. Appx. 812, 819 (6th Cir. 2005). As such, Defendant is entitled to summary judgment on any claim for harassment under the FMLA.

IV. CONCLUSION

On the basis of the foregoing, Defendant's Motion for Summary Judgment (Docket Entry No. 18) will be granted with respect to Plaintiff's claims under the ADA and any claim for harassment under the FMLA, but denied with respect to Plaintiff's claim for retaliation/discrimination under the FMLA.

An appropriate Order will be entered.

/s/ Robert L. Echols
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

NO. 3:05-CV-0840
C.O.A. No. 07-5006

[Dated October 31, 2006]

MARTHA L. BRYANT,

Plaintiff,

v.

DOLLAR GENERAL CORPORATION,

Defendant.

BEFORE THE HONORABLE ROBERT L. ECHOLS
TRANSCRIPT OF PROCEEDINGS

VOLUME 1

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* * *

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THE COURT: Pardon me?

MR. JANNEY: Should Ms. Bryant go ahead and come around?

THE COURT: Sure.

(Following proceedings were held within the presence and hearing of the jury :)

THE COURT: Okay, Mr. Frazier.

CROSS EXAMINATION

BY MR. FRAZIER :

Q. All right, Ms. Bryant. This is my opportunity to ask you some questions here.

I want to start out, just to make sure we're all on the same page.

A. Okay.

Q. Your claim is that you were fired for requesting or taking leave under the Family and Medical Leave Act; is that correct?

A. Correct.

Q. That's the only thing you're suing for here today?

A. That's my -- yes.

Q. And you're not claiming that you made some internal complaint about FMLA treatment and were fired as a result of that complaint, are you?

A. Say that again.

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except your closing arguments. You ought to have enough in you to review these today and get some sense about them. But I won't cut you off from other considerations in the morning.

So let me have that done and I will send them right back out to you. Then I'll come out in a few minutes, after you've had a chance to review them, and get some preliminary comments about them.

MR. FRAZIER: When do you want to take up the motion for judgment as a matter of law?

THE COURT : Oh. Let's do that now.

MR. FRAZIER: And really, for the record's benefit, as well as so we're all clear on this, the plaintiff has just closed. And the proof has gone a little differently than normally is the case.

While we haven't formally said this, we do not plan to call Ms. Campbell and Ms. Tucker back. So we formally close at this point. While normally I would be making this at the close of plaintiff's proof, it's my understanding this will count for both.

Is that correct, Your Honor?

THE COURT: That's my understanding.

Is that your understanding, Mr. Janney? All the proof is in. Both the proof in chief by the plaintiff, defense proof and rebuttal proof.

MR. JANNEY: All the proof is in, Your Honor.

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THE COURT: Okay.

MR. FRAZIER: Your Honor, there is only one issue that's remaining, one claim that's left before the Court. That is a claim of retaliation under the Family and Medical Leave Act. Specifically, Ms. Bryant 's claim is that she was terminated in retaliation for taking leave under the FMLA.

I first would like to kind of talk about the legal context and then go to the facts of this case. From what I have been able to find in looking back at this in the statute, at 29, USC, Section 2615, under *Prohibited Acts*, that's where it has information with regard to interference and then discrimination. And under the statute, it specifically deals with discrimination "against any individual for opposing any practice made unlawful by this subchapter".

Now, if you look at the regulations at 29, CFR, Section 825.220, the first part of that almost mirrors the statute. But then in the regulations, it was expanded somewhat in (c), where it says, "An employer

is prohibited from discriminating against employees or prospective employees who have used FMLA leave." And then it provides several examples. In the examples, it deals with issues such as full benefits and vacation time, treatment under the no fault attendance policy.

Defendant reserves its issue with regard to whether the

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statute actually covers this type of discrimination; but in saying that, recognizes that the Sixth Circuit has ruled on this issue at this stage. But we, again, preserve that legal argument.

Looking at the regulations, again it just prohibits discrimination against an employee who has used FMLA leave. Ms. Bryant testified -- and testified clearly, unequivocally and in response to, I believe, her attorney's questions -- that the first time she exercised rights under FMLA, took FMLA leave, was on May 12th of 2004. Clearly, that would be after the write-up and after all of the issues related to the write-up.

So the question then becomes whether the fact that she took six days off, according to the evidence that is in, is enough to leave a jury a question of fact as to whether her termination was the result of taking that leave. And the defendant's position is that it is not.

From a prima facie case standpoint, the only thing they have is temporal proximity. And the defendant

submits that under Sixth Circuit precedents, temporal proximity is not enough standing alone.

The other thing that the Court has to consider here is how this all came about. The only reason that she even was on FMLA, the only reason it was even an issue, is that Ms. Campbell, who is supposed to be the person who's doing

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the retaliation here, had suggested to her that she go and talk to the Human Resources about going on FMLA.

So it's the same actor type issue. Do you hire a minority employee just so you can discriminate against them? Here, do you encourage a person to go talk to HR about FMLA just so that you can subsequently retaliate against them for exercising that right? Defendant's position is that there is a higher burden that is in play in that situation that has not been met in this case.

The other thing that the Court needs to consider is the question of why she was terminated. Everyone who had knowledge and direct involvement testified that she was terminated because she continued talking about the progressive counseling process, being on progressive counseling.

And it's interesting to me. You get into kind of a business judgment rule. I mean our position is she was told not to talk about progressive counseling. That's the testimony that we've provided. You hear the

testimony of Amy DiStefano, and Ms. DiStefano said that she was asked if Marty, Ms. Bryant, had told her she was on progressive counseling.

So according to one of their witnesses, the concern and the question that was in the mind of the company at the time was not did she tell you the details, but did she talk to you

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about being on progressive counseling, further bolstering that.

Again, it goes to Mr. Dishman. And it's a situation where I can tell you -- and I recognize Your Honor has a realtime transcript, but I can tell you almost exactly what he said, because I was mirroring his deposition testimony. And the question was whether Ms. Tucker came by to talk to him. Yes. Did she ask you if Ms. Bryant had talked to you about being on progressive counseling? And he said yes.

And then I said, Did she ask you if Ms. Bryant had disclosed any details about the goings on in conversations or anything that had happened? He said yes.

Then he goes to talk with Ms. Short in HR. And, again, Ms. Short, almost verbatim, asked the same questions. Had Ms. Bryant been talking to him about the progressive counseling and had she given details. And he answered truthfully and said yes.

So there's not a question of fact. The question of what was intended by the warning, unless there is a question that throws it into doubt, is what was intended by the employer. That goes to the business judgment rule.

The employer says, I don't want you talking about progressive counseling. To the extent she didn't understand it, she could have asked the question. There's no evidence that she asked questions. There's no evidence that she was

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unclear what was meant. And while she disputes the first time, the second time she acknowledges that she in fact was told that she was not to talk about the progressive counseling.

They went to talk to Mr. Dishman. He provided the information we have here. And, consequently, she was terminated.

There's no evidence of any other employee who had confronted -- and that was Ms. Bryant's word. She said yes, I confronted these other employees. There's no evidence of any other employee who had confronted other individuals who had been involved in an investigation, making them feel uncomfortable.

There's no comparator evidence here. And it is the defendant's position that no reasonable jury could find in Ms. Bryant's favor.

As an alternative, Your Honor, there's the question of liquidated damages. We would submit that in a case where she was encouraged to go seek out FMLA, where her time deadlines were extended, where clearly this is a company --

Mr. Dishman talked about the company going above and beyond the call of duty. She had taken FMLA before. There is not proof here to justify liquidated damages. And we would ask that if not judgment as a matter of law as to all issues, that we receive judgment as a matter of law as to

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that issue.

THE COURT: Okay. Mr. Janney.

MR. JANNEY: If Your Honor please.

The Court should deny defendant's motion for judgment as a matter of law. There is more than ample evidence in the record in this case for a reasonable jury to conclude that Ms. Bryant's exercise of certain rights under the FMLA were a motivating factor in the decision to fire her.

Mr. Frazier talked about her first taking FMLA leave on May the 12th. This case is not just about taking FMLA leave. It's about requesting FMLA leave on April the 16th, 2004.

There's an exhibit in the record dated April the 16th, 2004, with Diane Short's name on it, with Ms.

Bryant's name on it. It's called a *Request For FMLA Leave*. Ms. Bryant went and got her doctor certification. She turned in her doctor certification on May the 7th. It's undisputed. And then she ended up exercising FMLA leave.

Mr. Frazier indicated that the only thing the plaintiff has is the temporal proximity and that the temporal proximity is not enough. The Sixth Circuit also held that if the temporal proximity is acutely near in time, that a jury could infer discriminatory or retaliatory motive from that fact. In this case, that is certainly the case. We're talking just a matter of days after she last exercised FMLA leave that she came back in and was fired.

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Ms. Bryant. In fact, he testified that he was shocked when Tonya Tucker came to him and asked him, Has Ms. Bryant been discussing her progressive counseling with you?

Your Honor, as far as the liquidated damages issue that Mr. Frazier addressed. As the Court is aware, under the Sixth Circuit there is a strong presumption in favor of doubling any damages awarded by the jury. The defendant has to prove both a good faith belief in its decision and that it was a legitimate decision. And in light of the strong presumption, our position is the defendant is not going to be able to overcome that if this jury finds that the defendant retaliated against her for exercising her rights under the FMLA.

In other words, was her exercise of any rights under the FMLA a motivating factor. Not the sole reason, but a motivating factor. Then they may find retaliation on this record. We submit that an employer cannot retaliate against an employee for taking FMLA leave and it not be willful.

Your Honor, there's more evidence in the case and we'll rely on what's in the record. But in this case, the defendant's Rule 50 motion should be denied.

Thank you.

THE COURT: The case has been simplified a great deal, in that there is one essential element or claim. And that's whether or not the defendant violated the plaintiff's

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rights under the Family and Medical Leave Act. And that act does prohibit employers from retaliation against employees because they avail themselves of rights granted to them under the FMLA; which, as the lawyers know, gives them 12 weeks a year of leave. It's uncompensated leave, but it's a valuable right for employees.

There are certain elements to establish a prima facie case for violation of the Family and Medical Leave Act. And that includes that the plaintiff must show that she did, in fact, avail herself of one of the protections under the Act. And the proof shows that she did so.

That's supported by other proof by the plaintiff, that she had certain serious health ailments. She had a serious health condition which included diabetes, high blood pressure, and heart problems. And she had taken Family and Medical Leave Act earlier to take care of her mother before she passed away. And she availed herself of that right again.

There is proof that one of her supervisors had suggested that she go to the Human Resources office and learn more about that and see if the benefits were something that would be of benefit to her. So there's no question but that she did avail herself of that protected right.

There's not much question but that she suffered an adverse employment action. She was terminated. That's

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another requisite bit of proof under the requirement to establish a prima facie case.

And, thirdly, she must prove that there was a causal connection between her availment of that protected right and her termination or adverse employment action. And that's where the parties' proof and their positions in the case are hotly contested and are contradictory.

Assuming the plaintiff is able to establish that prima facie case, then the proof is not over. Then the defendant has an opportunity, under prevailing law, to show, to prove -- the burden or the production of the

evidence shifts to the defendant to prove that there was a nondiscriminatory, nonretaliatory reason for its termination of the plaintiff, and it was not because of her taking advantage of this protected right under the FMLA.

And the defendant has offered such proof. That proof being that she was put on progressive counseling; which, according to the testimony by one of the witnesses, began two weeks or so before she was scheduled to have a vacation.

During the interim, there was this big argument on April the 30th of '04, which was heated and loud. And she then decided to add a Part 2 to that progressive discipline. And it was then given to her when she returned from vacation.

So that's the question around which a lot of the proof has been presented. And both parties have presented

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evidence. The plaintiff has presented evidence to show that this was not the real reason or the actual reason for her termination, that that was simply a pretext; that the employer has given different reasons other than that progressive discipline. And they have submitted evidence showing that they not only were aware of her medical condition, that it appeared to be deteriorating, but that she was working on a project that was stressful to her and all those people working on it and that they had missed several deadlines.

The argument that erupted on April the 30th centered somewhat on the fact that other employees working on the project had met their deadlines, but they were required to stay because she had not met her deadlines. And that those were concerns expressed at the time as being one of the reasons for the company not being happy with her. She had had problems learning this new Oracle language in the computer.

Other testimony centered on some of her performance and the fact that she was not able to make deadlines and there had been continual extensions to that. But a lot of that, her inability to meet deadlines, was also related to her missed time for going to the doctor and her stress level at work. The testimony of some of the witnesses pointed to some of the performance problems, including missed deadlines, as

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well as the stated reasons for talking about progressive counseling.

The plaintiff has tried to show that progressive counseling was not unusual. There was no policy that prevented people from talking about it. And that no one else -- these witnesses didn't know of anyone else that was dismissed or disciplined because they talked about their own progressive counseling.

The proof by the defendant, however, is that the plaintiff was told on two occasions -- once when she was put on progressive counseling -- not to talk about it. There was another instance in which she was told

more directly not to talk about it or she would or may be terminated. And shortly thereafter, maybe immediately after, she went and talked to a coworker about the progressive counseling.

There's also a conflict of evidence about what she was told. Ms. Bryant admits that she was told not to talk about the progressive counseling. Her interpretation of the instructions, as I recall, was that she was not to talk about the document, the contents of the progressive counseling -- what she was to do; what she was not to do; what, if any, deadlines were established; and the real content of the progressive counseling -- not simply the fact that she was on progressive counseling.

But the proof does show that she was troubled over the

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fact and she was upset that she was placed on progressive counseling, that she didn't think it was fair or proper. She was disturbed that others who were involved in this argument, which was one of the reasons for the progressive counseling, were not also placed on progressive counseling. And she felt that some of the information in the document justifying the progressive counseling was in error. She, in fact, refused to sign it. So there is some disagreement between the employee and the management about the suitability of progressive counseling.

There is sufficient proof in the record to show or the jury could find that she did, in fact, talk about the

progressive counseling. There is some contradictory evidence or confusing evidence about what that meant, and we've had different versions of what that meant. And that will be a jury question.

The Court believes that it's a jury question for the jury to determine whether there is that required causal connection between the adverse employment -- that is, her termination -- and the fact that she took time off under the Family and Medical Leave Act.

There's other evidence to dispute that or support that. The fact that she had taken it before would indicate that it was acceptable to the defendant for employees to take advantage of that. There's other evidence that they, in

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fact, suggested that she consider that as an intermediate remedy. And this was when her supervisor discovered it was not only for long-term absences, it could be taken for intermediate absences, too.

So the defendant points to that as proof that they had no intention of preventing her from taking that leave or for retaliating against her because she did take it. But, rather, the stated reason, that she was insubordinate in not obeying her supervisors and talking about that and interrupting and interfering with other employees, by making them uncomfortable to the extent that they indicated to others that they were. Part of the testimony to that degree is contradicted by some other plaintiff's proof.

I sort of rambled through some of the proof on that, but the rules for consideration by the Court in establishing a judgment as a matter of law under Rule 50 relates to some of that analysis that I have pointed to.

The Court must enter a judgment as a matter of law only if it's apparent that the party against whom the motion is made -- which in this case is the plaintiff -- cannot carry, is unable to carry her burden of proof that is essential to the case; that is, proving that she was retaliated against because she exercised her rights under the FMLA.

So the Court must review the evidence at this point to determine whether or not a reasonable jury could find for the

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plaintiff with respect to her claim; or, as suggested by the defendant, could a reasonable jury find only for the defendant, only in one way, in favor of the movant.

So the Court must determine whether the evidence presents such a sufficient disagreement to require the issue to be presented to the jury or whether the evidence is so one-sided that a reasonable jury could find only for the defendant as a matter of law. It's not for the Court to weigh the evidence to determine which way it preponderates, but whether or not it unmistakably favors one side so much that the nonmoving party could not prevail as a matter of law.

The Court does not believe in this case that the evidence is so one-sided that the jury could not -- a reasonable jury, this jury -- could not find in favor of the plaintiff. So the motion will be denied.

Now, I'm going to take just a few minutes and make copies of this proposed charge. While I'm doing that, I would suggest that the parties discuss these stipulations that we talked about. And I will send you out copies of this just as soon as they can be made.

(Recess was taken at 4:50 p.m.)

THE COURT: Be seated.

I presume the lawyers have had a chance to look at the

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and things mentioned in the evidence in the case.

Now that I have instructed you on some of the general legal principles, I will turn to the specific rules of law that you must apply to the facts of this case.

Plaintiff seeks to collect damages from defendant based on what she contends was her retaliatory discharge for taking leave under the Family and Medical Leave Act ("FMLA"). That is, she claims that a reason for her being fired was that she took leave which the law allowed.

Defendant denies that it retaliated against the plaintiff because she exercised her rights under the FMLA. Defendant claims that plaintiff was terminated because defendant learned she had continued to discuss her progressive counseling with coworkers, even though she had been told that she should not discuss the counseling with other employees.

The issues which you are called upon to decide are as follows:

1) Was plaintiff entitled to FMLA?

This is not disputed. The parties agree that she was entitled to FMLA leave.

2) Did plaintiff suffer an adverse employment action?

This is not disputed. The parties agree she was terminated.

3) Was there a causal connection between plaintiff

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taking FMLA and her termination?

In considering Question No. 3, you should answer the following questions:

a) What was the reason (or reasons) that defendant terminated plaintiff's employment?

b) Was defendant s stated legitimate, nonretaliatory reason (or reasons) for discharging plaintiff the real or actual reason for her termination, or was it merely a pretext for retaliating against plaintiff for exercising her rights under the FMLA?

In other words:

c) Was plaintiff taking FMLA a determining or motivating factor in defendant's decision to terminate her employment ?

4) If you find that defendant violated plaintiff's rights under the FMLA, what damages, if any, is plaintiff entitled to receive?

The ultimate question in this case is whether plaintiff has proven by a preponderance of the evidence that retaliation for taking FMLA was a determining or motivating factor in defendant's decision to fire her. If you find that she has done so, you will find for plaintiff and then consider the amount of damages, if any, to which plaintiff is entitled.

If you find, however, that defendant 's decision to fire

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REPORTER'S CERTIFICATE

I, Dorothy Stiles, Official Court Reporter for the United States District Court for the Middle District of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on November 2, 2006, in the matter of MARTHA L. BRYANT vs. DOLLAR GENERAL CORPORATION, Case No. 3:05-CV-0840; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (Volume 3, Pages 482 through 579) is a true and accurate record of said proceedings.

This the 15th day of February 2007.

/s/ Dorothy Stiles, RMR, CRR
Official Court Reporter